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A

TREATISE

ON THE

LAW OF INSURANCE.

By WILLARD PHILLIPS.

IN TWO VOLUMES.

FIFTH EDITION.

VOL. I.

NEW YORK:  
PUBLISHED BY HURD AND HOUGHTON,  
459 BROOME STREET.  
1867.

Entered according to Act of Congress, in the year 1867, by  
WILLARD PHILLIPS,  
in the Clerk's Office of the District Court of the District of Massachusetts.

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P5473i  
1867

RIVERSIDE, CAMBRIDGE:  
PRINTED BY H. O. HOUGHTON AND COMPANY.



RF 29 May 53

## PREFACE.

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IN the present fifth edition of this work, bearing date forty-four years after the original one, those consulting it will find additions and modifications, supplied by recent jurisprudence as well as by revision; instances of which will be found in respect to implied warranty in time policies; express warranties in fire insurance; assignment of policies; alienation of the subject; premium notes; peculiarities of mutual insurance companies; subrogation or salvage in fire insurance; and especially under life policies. Eight hundred additional recently adjudicated cases have been stated or cited, and some retrenchments have been made.

I wish still especially to commemorate the kindness of the late Honorable George Cabot, of Boston, in giving me the benefit of his experience as president of a marine insurance company, in the settlement of losses; and also that of the late Christian Mayer, President of the Patapsco Insurance Company of Baltimore. D. A. Gleason, Esq., of Boston, has rendered me his valuable assistance in preparing the present edition.

WILLARD PHILLIPS.

CAMBRIDGE, MASSACHUSETTS,  
*September, 1867.*

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A

# TREATISE

ON THE

## LAW OF INSURANCE.

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### CHAPTER I.

#### OF THE CONTRACT OF INSURANCE.

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#### SECTION I. INSURANCE DEFINED AND EXPLAINED.

1. *INSURANCE is a contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against damage or loss on a certain subject by certain perils.*<sup>1</sup>

Marine insurance is a contract whereby, for a consideration stipulated to be paid by one interested in a ship, freight, or cargo subject to marine risks, another undertakes to indemnify him against some or all of those risks during a certain period or voyage.

<sup>1</sup> Mr. Duer, *Mar. Insurance*, Vol. I. p. 49, considers the amount insured to be an essential part of the contract; but I do not see any thing to prevent an insurance without any limitation of the amount. Other contracts of indemnity are frequently made without such a limitation. An indemnity must be stipulated for. *Flanagan v. Camden Mut. Ins. Co.* 1 Dutch. N. J. 506. See also *Commonwealth Ins. Co. v. Sennett*, 37 Penn. St. 205.



The other species of insurance most in use are those against loss by fire on land, and loss of life.<sup>1</sup>

2. *The party undertaking to make the indemnity is called the INSURER or UNDERWRITER; the party to be indemnified, the ASSURED or INSURED. The agreed consideration is called a PREMIUM; the instrument by which the contract is made, a POLICY; the events and causes of loss insured against, RISKS or PERILS; and the property or rights of the assured, in respect to which he is liable to loss, THE SUBJECT or INSURABLE INTEREST.*

3. *The INDEMNITY intended in assurance is not the putting of the party insured into as good a condition as he would, in fact, have been in had no loss happened, it means the repayment of the expenses incurred, and the payment for as much of the insured subject as is lost, at its market value at the commencement of the risk, or its value as agreed in the policy.* Where such value exceeds the real value of the subject at the time of the loss, the assured is, in fact, more than indemnified; where it is less, he is, in fact, not fully indemnified; but he is in either case precisely indemnified according to the principles and stipulations of the contract.<sup>2</sup>

This contract was formerly defined as a maritime, or at most a mercantile one;<sup>3</sup> but it is now considered as extending not only to indemnity against sea-risks, fire on land, and death, but many other events are its subjects. It was held by the Court of Common Pleas in England, that an agreement, in consideration of the payment of 40 guineas, to pay £100 "in case the Impe-

<sup>1</sup> Mr. Justice Lawrence says: "The contract of insurance is applicable to protect men against uncertain events which may in any wise be of disadvantage to them." 5 Bos. & P. 301, *Lucena v. Craufurd*. See, for sundry definitions of insurance, Mr. Sergeant Coleridge's argument in *Paterson v. Powell*, 9 Bingh. 320. For a history of Insurance, see Beckmann, *History of Inventions, &c.* by Johnson, 4th edit. Lond. 1846, Vol. I. p. 234, tit. Insurance. Anderson, *Hist. of Com.* Lond. 1789, Vol. II. pp. 102, 202, A. D. 1560, 1601.

<sup>2</sup> See remarks of Patteson, J. 6 C. B. 422, *Irving v. Manning*.

<sup>3</sup> So Emerigon describes it from Le Guidon, and cites Stypmannus, c. 7, n. 262, as extending it to property transported. So Loccenius, *De Jure Maritimo*, Lib. 2, 65, n. 4, 5. Weskett, tit. Insurance, 2, confines it to sea risks, and says, "he offers his definition as more adequate and complete than any he had met with, and comprehending those of all the esteemed authors who had treated of it." Valin, Vol. II. p. 26, defines marine insurance only, because the Ordinance on which he commented related only to that species of insurance. See also Boulay Paty, *Droit Com.* tit. 10, tom. 3, p. 233, ed. 1822.



rial Brazilian mining shares should be done at or above £100 per share, on or before the 31st of December, 1829," was an insurance, and, as such, prohibited by statute.<sup>1</sup> Since, however, it is most frequently entered into as a mercantile contract, and the greater part of the principles of insurance apply to it as such, this form of contract is always understood to be intended when the contrary is not expressed.

4. As to *the essential part of this contract, it does not differ from a bond of indemnity, or a guaranty of a debt*, since the obligor or guarantor takes upon him certain risks, to which the obligee or creditor would otherwise be exposed. The only difference is in names, and the form of the instrument, the consideration for an insurance being always called a premium, and the instrument containing the terms of the contract, a policy, which is usually made in a form peculiar to this species of contract.

5. *Insurances are usually described to be of two kinds, namely, policies on interest, and gaming policies*, in which latter the person insured is not required to have any interest in the thing insured, and needs not to be exposed to any risk against which the policy is intended to protect him. "Gaming policies," says Lord Mansfield, "are mere games of hazard, like the casting of a die."<sup>2</sup> They are wagers made in the form of policies, which in other respects differ, no less than other wagers, from the contract of insurance. A wagering policy does not seem properly to belong to the subject of insurance,<sup>3</sup> since it is prohibited by positive law in

<sup>1</sup> 14 Geo. III. c. 48. *Paterson v. Powell*, 9 Bingh. 320.

<sup>2</sup> Dougl. 470.

<sup>3</sup> Emerigon, c. 1, s. 1, says, a wager in the form of insurance resembles it only in name. So Valin, in his definition of marine insurance, Vol. II. p. 26, excludes a wagering policy. Christian, on the contrary, says, that "insurance is in effect nothing more than a wager, for the underwriter, who insures at five per cent., receives five pounds to return one hundred, upon the contingency of a certain event, and it is precisely the same in its consequences as if he had betted a wager of ninety-five pounds to five, that the ship arrives

safe, or that a certain event does not happen." 2 Blackstone, Comm. 459, n. It is described by the civilians to be an aleatory contract, "since the consideration which one party receives is not the price of a thing which he gives, but of a risk which he agrees to take upon himself." Boulay Paty's Emerigon, c. 1, s. 2.

Where wagers in general are enforced as legal contracts, wagers on the arrival of a ship are sometimes declared to be unlawful, as against public policy; for a community, it is said, has a great interest in its commerce, and it is wrong to permit any one to have an interest that may make him desire that a ship should

many countries, and is considered to be illegal, without any express legislative provision, in others, and is very little used where it is held to be lawful; and especially since it is distinguished by one essential circumstance from what is properly an insurance, inasmuch as insurance is universally considered to be a contract of indemnity, which a wager is not. The subject of gaming policies will therefore be noticed only for the purpose of distinguishing what policies belong to this class.

The contract of insurance, then, agrees in substance with a bond or any other contract of indemnity or guaranty, but differs in form; whereas it agrees with a wagering policy in form, but differs in its character, its objects, and the rules by which it is interpreted.

## SECTION II. THE FORM OF THE CONTRACT.

### 6. WHERE the subject, the relation of the parties, and the ob-

be wrecked, since the cupidity of men cannot be trusted in such a case. Emer. c. 1, s. 1. Wagers of this description have, however, been allowed in some parts of Italy. Roccus, de Assec. n. 73; Pothier, par Estrangin, No. 11, n. By the French Ordinance, Ins. a. 22, and Code, see Boulay Paty, Droit Com. tit. 10, tom. 3, p. 238, ed. 1822, wagers in the form of insurance are prohibited; and long ago the French courts refused to take cognizance of frivolous wagers in the form of insurance. Les Us et Cout. de la Mer, p. 116. Le Guidon, c. 1, a. 5. So by the regulations of Amsterdam, a. 13, 2 Mag. 132, No. 524; and those of Genoa, Casa Regis Disc. 7 and 15; of Stockholm, a. 2, s. 7, 2 Mag. 257, No. 1629; of Prussia, c. 6, a. 10, 2 Mag. 189, No. 780; of Middleburg, a. 2, 2 Mag. 68, No. 161.

Wagering policies on voyages were held to be lawful, and were very much in use, in England before 1746, when they were prohibited by the Stat. 19 Geo. II. c. 37, "because the permitting of them had been productive of many pernicious practices, whereby great num-

bers of ships with their cargoes had been fraudulently lost; and had encouraged prohibited and clandestine trades to the diminution of the revenue, and the great detriment of fair traders;" and by Stat. 14 Geo. III. c. 48, wagering policies on deaths and other events were prohibited; and by Stat. 8 and 9 Vict. c. 109, s. 18, all wagering contracts are declared void. In Massachusetts, wagering policies are considered void, though not prohibited by statute. Amory v. Gilman, 2 Mass. 1. And this doctrine seems to be adopted in Pennsylvania. Adams v. Pennsylvania Ins. Co. 1 Rawle, Penn. 97. In New York they were formerly held to be legal. Juhel v. Church, 2 Johns. Cas. N. Y. 333. Mr. Chief Justice Savage, however, says, "it is to be regretted that wagers were ever allowed to be the subject of an action." Buchanan v. Ocean Ins. Co. 6 Cow. N. Y. 318. And by the Revised Statutes of that State, which came into force in 1830, Vol. I. p. 662, no action can be maintained on any wager. And see Howard v. Albany Ins. Co. 3 Den. N. Y. 301.

ject of the contract, continue to be the same, *some degree of uniformity is naturally preserved in the general form of the contract.* The ancient outline of the policy has been more nearly adhered to in England than in the United States. In the latter, there is a considerable variety, and new features and modifications have been introduced from time to time. "A policy of insurance has been considered as an obscure, incoherent,<sup>1</sup> and a very strange instrument."<sup>2</sup> But the obscurity and uncertainty complained of do not probably arise altogether from any imperfection in the policy which can be remedied.<sup>3</sup> *A contract embracing so many interests and parties, and liable to be affected by so many events, cannot but be subject to some difficulties of construction, however skilfully it may be drawn.*

7. *In the United States, whether a policy be a wager or not, depends on the whole instrument.*

Though the assured have an interest in the subject and the risk, this does not preclude his making a wager respecting them.<sup>4</sup> As, where a policy was, that a ship should save her passage to China that season, it was held to be a wager, though the insured had some goods on board.<sup>5</sup> The expressions "interest or no interest," or others equivalent, are commonly used in wagering policies. A great variety of expressions might be adopted in this sort of policy, according to the subject, and the event upon which the wager depends. It often happens in insurances intended to be on interest, that the assured has, in fact, no interest exposed to the risks enumerated; yet these are not therefore wagering policies, and he is entitled to a return of the premium. To render a policy a wager, it must appear to be such on its face.<sup>6</sup>

<sup>1</sup> Per Buller, J. 4 Term, 210.

<sup>2</sup> Per Mansfield, C. J. 4 Taunt. 380.

<sup>3</sup> Mr. Justice Lawrence says, "It is wonderful that policies should be drawn with so much laxity." *Marsden v. Reid*, 3 East, 579. Chief Justice Marshall, "Policies of insurance are generally the most informal instruments which are brought into courts of justice." 5 Cranch, 342. And again, "The contract of insurance is very loosely drawn." 6 Cranch, 45. Lord Mansfield said,

"The instrument is conceived in an inaccurate form of words." 1 Burr. 347. But that "length of time and a variety of decisions have reduced it to a certainty." Dougl. 270.

<sup>4</sup> *Juhel v. Church*, 2 Johns. Cas. N. Y. 333.

<sup>5</sup> *Kent v. Bird*, Cowp. 583. See also *Kulen Kemp v. Vigne*, 1 Term, 305; *Tasker v. Scott*, 6 Taunt. 234.

<sup>6</sup> *Cousins v. Nantes et al.* 3 Taunt. 513; *Williams v. Smith*, 2 Caines, N. Y. 13.



Accordingly, *though the instrument contain phrases and provisions usually belonging to a wagering policy, still, if it appear, on the whole, to be a contract of indemnity, by which the claims of the assured are to be commensurate with the damage he may sustain, and if it can be executed as such, the provisions contained in it, inconsistent with the general tenor of the instrument, will be controlled and made void.*

Where it was stipulated that, in case of loss, no proof of interest should be required, and that there should be no return of premium, the court decided that those stipulations were void, and there should be proof of interest, and return of premium, as under policies in the usual form.<sup>1</sup>

But where it was agreed in a policy that a total loss should be paid if the ship did not return, and that no partial loss should be paid, and no benefit of salvage claimed, and no proof of interest, except the policy, required, it was held to be a wager on the return of the ship; for the contract provided that, if it did not return, the whole sum insured should be paid, and by the other parts of the policy, as well as this, it appeared plainly that it was not intended to be a contract of idemnity, under which the sum to be paid by the insurer was to be measured by the damage sustained by the assured.<sup>2</sup>

By the statute of 19 Geo. II. c. 37, s. 1, it is enacted, that no insurance shall be made on any ship or goods to be taken on board of a ship, "interest or no interest, or without any further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the insurer." Before the passing of this act, gaming policies were resorted to for the purpose of protecting persons who were carrying on illegal traffic, and were made the means of gaining by the wilful destruction of ships. Privateers, and also ships going to Spain and Portugal, and accordingly not being likely to export wool, or import articles that could interfere with British manufactures, were excepted from the act, which shows, as Mr. Chief Justice Abbott, since Lord Tenterden, remarks, that the object of the act was not merely to prevent gaming. It has been held that "a policy which dispenses with all proof of interest is within the act, and void,"

<sup>1</sup> Hemmenway v. Eaton, 13 Mass. 108. Park, 402; 3 Bos. & P. 101; 6 Term, See also Clendining et al. v. Church, 3 483, n.

Caines, N. Y. 141; Grant v. Parkinson, <sup>2</sup> Juhel v. Church, 2 Johns. Cas. N. Y. 333.

and accordingly, that a policy in which "the goods insured were five tierces of coffee, valued at £27 per tierce; the policy to be deemed sufficient proof of interest," was void under this act, though it was made *bonâ fide* for the purpose of protecting an insurable interest, and was not in any respect, except its form, a gaming policy.<sup>1</sup>

Mr. Justice Story considers that in Massachusetts a policy on a substantial interest, though greatly overvalued, to the amount of from four to ten or fifteen times its probable value at the time of making the valuation, is not a gaming policy and void as such, by the laws of that State, the underwriters not having any intention to underwrite a gaming policy. The question might be raised, whether such a valuation was an indication of unfairness on the part of the assured, and this would depend upon the other circumstances as well as the valuation.<sup>2</sup> A party insured in a policy on his own life is conclusively presumed to have an insurable interest.<sup>3</sup>

8. Cleirac says, there were formerly in use in France unwritten contracts of insurance, called insurances "in good faith,"<sup>4</sup> (confidence,) and illegal verbal insurances upon the slave-trade, called insurances "upon honor,"<sup>5</sup> were heretofore in use.

9. The French Code prescribes that the contract of insurance shall be made in writing, bearing date on the day when it is subscribed, expressing whether made before or after noon, and that it shall contain other particulars specified, and that no blank space shall be left in the instrument. Divers marine ordinances and statutes require that the contract shall be in writing;<sup>6</sup> and prescribe more or less particularly what it shall contain.<sup>7</sup>

<sup>1</sup> *Murphy and another v. Bell*, 4 Bingh. 567. But see *Grant v. Parkinson, Park*, 402; *Hodgson v. Glover*, 6 East, 316.

<sup>2</sup> *Alsop v. Commercial Ins. Co.* 1 Sumn. C. C. 451.

<sup>3</sup> *Valton v. Nat. &c. Ass. Soc.* 22 Barb. N. Y. 9. The time and mode of payment of loss are subjects of stipulation. *Commonwealth Ins. Co. v. Sennett*, 37 Penn. St. 305; and see *Rawls v. American L. Ins. Co.* 27 N. Y. 282; *Trenton Mut. L. & F. Ins. Co. v. Johnson*, 4 Zab. N. J. 576; *Dalby v. The India, &c. Ass. Co.* 15 C. B. 365.

<sup>4</sup> *Le Guidon*, c. 1, a. 27.

<sup>5</sup> *Boulay Paty*, sur. Emer. c. 2, s. 1.

<sup>6</sup> Ord. of Florence, Philip II.; Bilbao; Genoa; Middleburg; Rotterdam; Amsterdam; Prussia; Hamburg; Stockholm; Stat. 35 Geo. III. c. 63.

<sup>7</sup> Code de Com. Liv. 2, tit. 10, art. 332, 333, 337; Genoa, 2 Mag. 65; Middleburg, 2 Mag. 71, 72; Rotterdam, 2 Mag. 94; Amsterdam, a. 23, 2 Mag. 128; Prussia, a. 3, 2 Mag. 189; Hamburg, 2 Mag. 212; Stockholm, 2 Mag. 407.



We have no such provision of law in the United States relating specifically to insurance.

The risk of barratry and misconduct of agents could be insured against only in writing, according to the usual provisions of the statute law on the subject of oral and written contracts; but *it does not appear why*, under the common law, *a valid oral insurance may not be made against loss by fire, or the ordinary perils of the sea*, if it were upon a real interest, for a good consideration, and made in terms sufficiently explicit.<sup>1</sup>

It has been held in England by Judges Eyre, Ashhurst, and Wilson, sitting as commissioners in chancery, that an insurance not in writing would be void, as an evasion of the stamp duty.<sup>2</sup> And the English statutes, requiring the assured in certain cases to be named in the policy, imply that the contract is in writing.<sup>3</sup> Mr. Justice Tilghman, of Pennsylvania, hesitated to say that a valid insurance could be made otherwise than in writing;<sup>4</sup> and in Louisiana<sup>5</sup> and Ohio<sup>6</sup> the courts have said distinctly that it must be in writing; and it is usually spoken of as being so. In New York and Alabama parol insurance is held to be valid.<sup>7</sup>

There does not seem to be any reason for prescribing by law the contents of a policy of insurance, any more than those of any other species of contract. Where a species of contract is used as a cloak to gambling or cheating, or for any other purpose pernicious to the public, this may be a reason for legislative interference; otherwise, the common course appears to be the better one, namely, to leave parties to make such stipulations, and in such terms, as they may choose.

10. *A policy being forfeited by a violation of some of its conditions, a mere oral waiver of the forfeiture is not sufficient to*

<sup>1</sup> Mr. Duer, in his learned and able treatise on Marine Ins. Vol. I. p. 60, expresses the opinion that, under the common law, a valid insurance may be made by words spoken. And see *Jeffery v. Walton*, 1 Stark. 267, and *Boulay Paty*, Droit Com. tit. 9 des Contrats a la Grosse, s. 1, tom. 3, p. 44, ed. 1822.

<sup>2</sup> *Morgan v. Mather*, 2 Ves. jun. 18.

<sup>3</sup> 25 Geo. III. c. 44; 28 Geo. III. c. 56.

<sup>4</sup> *Smith v. Odlin*, 4 Yeates, Penn. 468.

<sup>5</sup> *Walden v. Louisiana Ins. Co.* 12 La. 135.

<sup>6</sup> *Cockerill v. Cincinnati Ins. Co.* 16 Ohio, 149.

<sup>7</sup> *Trustees, &c. v. Brooklyn F. Ins. Co.* 19 N. Y. 305; *Mobile, &c. Inst. Co. v. McMillan*, 31 Ala. n. s. 711. See also, *Wood v. Rutland, &c. Ins. Co.* 31 Vt. 552.

*revive it*,<sup>1</sup> unless some new consideration on the part of the assured supervenes, or some transaction takes place between the parties under the contract importing a waiver; such, for instance, as would be equivalent to receiving rent from a tenant for a time posterior to the forfeiture of a lease by non-payment of rent.

11. Insurance is most frequently made by an incorporated company; and "such a company is the mere creature of the act to which it owes its existence, and may be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes."<sup>2</sup> It is not only necessary that *the corporation should be authorized to underwrite policies; the contract must also be made in a form to bind the company.*<sup>3</sup> The old doctrine, however, that a corporation must contract under seal, no longer prevails; a corporation, as well as an individual, may, unless its charter restrains its power in this respect, without seal, authorize an agent to bind it. But a corporation is distinguished from an individual contractor in one respect; being usually an aggregate body, as insurance companies commonly are, it can bind itself, and, indeed, act in any respect, only by its agents. In contracting with such a body, therefore, it is necessary, not only to see that the contract is one within its authority to make, and that the person acting as the agent of the company is authorized to bind it, but also that the contract is in a form by which the company, according to its constitution, may be bound.

12. *Different forms of policy are used by some companies for ship, freight, and cargo.*<sup>4</sup> *The same form seems to be more generally used,* for the reason, probably, that two or more of the

<sup>1</sup> *Cockerill v. Cincinnati Ins. Co.* 16 Ohio, 149. See beyond, Nos. 904, 1040.

<sup>2</sup> *Head and Amory v. Prov. Ins. Co.* 2 Cranch, 167; and see *Walden v. Louisiana Ins. Co.* 12 La. 135; *Andrews v. Union Mut. Ins. Co.* 37 Me. 256; *Williams v. Cheney*, 3 Gray, Mass. 215; *Western v. Genessee Mut. Ins. Co.* 12 N. Y. 258; *Huntley v. Merrill*, 32 Barb. N. Y. 626; *Hambro' v. Hull, &c. Ins. Co.* 3 Hurlst. & N. Exch. 789; *Huntley v. Beecher*, 30 Barb. N. Y. 580.

<sup>3</sup> *Utica Ins. Co. v. Kip*, 8 Cow. N. Y. 20; *North River Ins. Co. v. Lawrence*, 3 Wend. N. Y. 482; *Beach v. Fulton Bank*, 3 Wend. N. Y. 283. *New York Firemen Ins. Co. v. Sturges*, 2 Cow. N. Y. 664; *New York Firemen Ins. Co. v. Ely*, 2 Cow. N. Y. 678; *Angell & A. Corp. c. 7*; *Fletcher v. United States Bank*, 8 Wheat. 338; *Stone v. Wood*, 7 Cow. N. Y. 453; *Perkins v. Washington Ins. Co.* 6 Johns. Ch. N. Y. 485.

<sup>4</sup> In New York, 1 Duer, Mar. Ins. 64.

interests in marine insurance, namely, ship, freight, cargo, and profits, are frequently insured at the same time between the same parties, and the transaction is simplified by combining them in the same instrument. Accordingly, the common forms of such policies contain some stipulations applicable only to the ship, others to the freight, or cargo; and others applicable to all these subjects, as well as to an interest in bottomry, respondentia, and commissions.

### SECTION III. AN AGREEMENT FOR INSURANCE.

13. It is often desirable to conclude an agreement for insurance immediately, lest some intelligence should induce one of the parties to recede. Accordingly, *it is the practice with private English insurers, on agreeing upon a risk, to subscribe a "slip," or short memorandum of the proposed insurance,*<sup>1</sup> which, according to the statement of one of a special jury, and so probably a man practically acquainted with the course of business, is considered to be binding on the parties; but Lord Kenyon held that it was not legally binding for want of a stamp,<sup>2</sup> and Lord Ellenborough gave, in effect, the same opinion.<sup>3</sup>

The practice in some companies is to enter the agreement on the books of the insurance company, subscribed by some officer authorized to bind the company. Such a memorandum is binding upon the company as an agreement to make a policy, if the premium is paid by the applicant in due time.<sup>4</sup>

<sup>1</sup> Marshall, Ins. 286, n.

<sup>2</sup> Rogers v. McCarthy, Park, 45, n.

<sup>3</sup> Marsden v. Read, 3 East, 572. By the Stat. 35 Geo. III. c. 37, and 63, an unstamped agreement to insure is not available as a contract. Stat. 54 Geo. III. c. 144, provides for stamping it. Lord Denman remarks of such an unstamped agreement, on which the premium had been paid, that "a court of equity would have compelled the insurer to execute a policy," (Mead v. Davidson, 3 Ad. & E. 303,) on the ground, as Mr. Duer supposes, that the agreement had been partly executed. 1 Mar. Ins. 131. The execution of such slips is not

a compliance with an agreement to keep insured; Parry v. Great Ship Co. 4 Best & S. 556.

<sup>4</sup> The president of an insurance company in Providence, giving his testimony said, "In effecting or settling a policy, the assent of the parties to doing a thing is in all respects as binding as the thing done, according to the usage and practice among underwriters." 2 Cranch, 164. And the practice and understanding of insurers generally are according to this statement.

At Marseilles, instead of a slip signed by the insurer, Emerigon says that the broker made out an abstract of the risk



14. *A party is not legally bound to the full extent of all the ordinary risks, by an agreement to make a policy, the same being executory on both sides, without some memorandum signed by him to that effect.*<sup>1</sup>

Insurance against some of the usual risks, whether in a marine, or fire policy, being required by the ordinary statutory provisions to be in writing, a merely executory oral agreement for a policy against those risks, so long as nothing is done on either side towards executing it, will not be binding. But where the premium has been paid, and the oral agreement has been in all respects executed by the party applying for the insurance, the transactions between the parties will be likely to amount to conclusive evidence, by admission of the underwriters, that they have executed and constructively delivered a policy containing the usual provisions, and that the same is in their office subject to the order of the assured, precluding any proof to the contrary on their part. This construction is favored by the frequent practice in the ordinary course of business, for assureds not to call for the policies at the office of the underwriters until some time after the same are made out, and it is not to be presumed that underwriters are at liberty, during all this time, to repudiate the contract; and if they have not this privilege, it is on the ground of a constructive delivery, by the policy being in the hands of the clerk, subject to the order of the assured. The company may therefore be well estopped from exonerating themselves by alleging their own neglect to make out the policy.

and terms, and the underwriter subscribed to the policy in blank, leaving it to be filled up by the broker according to the abstract. Emer. c. 2, s. 4. Signing policies in blank is contrary to the French Ordinance, and is disapproved of by Emerigon as exposing insurers to frauds, since they often found that the policy did not correspond to the broker's note.

<sup>1</sup> Some insurance companies keep a blank form of a memorandum of an agreement for insurance, to be filled up and signed by both parties. 1 Duer, Mar. Ins. 107. The agreement is signed by both parties, since the premium is usually not paid, or the promissory note given for

it, until the policy is filled up. So long as the contract consists of the mutual promises of the parties, the signatures of both are requisite, the promise of each being the consideration for that of the other; but when the premium is acknowledged to have been paid, the signing of a policy or an agreement for one, by the underwriter, constitutes a valid contract. See Boul. Paty, Droit Com. tit. 10, s. 1, tom. 3, p. 253, ed. 1822. *Hamilton v. Lycoming Mut. Ins. Co.* 5 Penn. St. 339. In *Audubon v. Excelsior Ins. Co.* 27 N. Y. 216, a verbal agreement to make out a policy was held to be a contract of present insurance. See also, *Western Mass. Ins. Co. v. Duffey*, 2 Kans. 347.

Some adjudications on other contracts than insurance give some countenance to the doctrine, that where the proposed assured has paid the premium, and fully performed the agreement on his part, the underwriter is bound by his oral promise to insure.<sup>1</sup> Other decisions of preponderating authority bear strongly against the doctrine, in reference to risks coming within the usual provisions of statutes of frauds.<sup>2</sup> If the underwriter is held not to be bound by his oral agreement so made and executed on the part of the proposed assured, the particular circumstances would be likely to be such as to render him liable in an action on the case.

In New York an agreement to continue an insurance to the mortgagee who had foreclosed was held equivalent to issuing a new policy to him.<sup>3</sup>

Under an agreement for insurance with one known to the company to be merely an agent, the company was held bound to issue a policy for whom it may concern.<sup>4</sup>

15. *A memorandum that a subject "is insured," or "shall stand insured," means that it is insured, or shall be so, according to the ordinary form of policy used in the office where the memorandum is made.*<sup>5</sup>

Negotiations being had concerning an insurance upon wheat, the secretary of the insurance company wrote to the applicant, that the company did not understand how he made the value so much as he proposed to get insured, saying, "The market price and five per cent. is the rule," and that he might call the next Monday on the subject, and that, in the mean time, "it might stand insured until Monday;" before which day a loss occurred. This was held in Ohio to be an insurance.<sup>6</sup> This supposes the secretary to have authority to bind the company in such a case, which most usually he has not.

So an application for reinsurance on a certain policy, with the indorsement, "Taken at three per cent.," duly signed, is an agree-

<sup>1</sup> *Hoby v. Roebuck*, 7 Taunt. 157; *temere v. Hayes*, 5 Barnew. & Ad. 456, S. C. 2 Marsh. 433; *Mavor v. Pyne*, 2 per Parke, B.  
Carr. & P. 91; S. C. 3 Bingh. 285; <sup>3</sup> *Benjamin v. Saratoga Ins. Co.* 17  
*Donellan v. Read*, 3 Barnew. & Ad. 906; N. Y. 415.  
*Commercial Ins. Co. v. Union Ins. Co.* <sup>4</sup> *Oliver v. Mutual Ins. Co.* 2 Curt.  
19 How. 318; *Trustees, &c. v. Brooklyn* C. C. 277.  
*Ins. Co.* 19 N. Y. 305. <sup>5</sup> *Ins. Co. v. Mordecai*, 22 How. 111.

<sup>2</sup> *Teal v. Auty*, 2 Ball & B. 100; <sup>6</sup> *Neville v. M. M. Ins. Co. of Cincin-*  
*Griffiths v. Young*, 12 East, 513; *Bet-* *nati*, 17 Ohio, 192.



ment to reinsure against the risks taken in the original policy, and may be enforced to the same effect as the policy might have been, if made out.<sup>1</sup>

16. *The agreement for an insurance, like other contracts, requires the mutual assent of the parties, and remains in force, and is not discharged, until such a policy as is agreed for, is made out, or the claim for it is waived.*

A fire company having agreed by indorsement on a certificate in which the application was recited, to issue a policy upon a building, provided the applicant should make a certain alteration in it, and procure a ratification of the insurance by the trustees of the building, the applicant thereupon made the alteration, procured the consent of the trustees, and paid a part of the premium to the agent of the company, and gave his premium note for the remainder. The agent promised to inspect the alteration, and examine the document whereby the trustees had given their consent, but, though frequently requested by the applicant, he neglected so to do for more than a year, when the building was burnt. Gibson, C. J., and his associates of the Supreme Court of Pennsylvania, held this to be a valid agreement.<sup>2</sup>

An insurance company may agree for a policy by its agent as well as by its officers. An agent of a fire company who was authorized to make surveys of buildings, and agree for, but not to make out and sign policies, agreed with an applicant for a policy of a certain amount on a certain building for a certain period, and received the premium, and while the application and premium note, having been dispatched by mail by the agent, were on the way, and the officers of the company had as yet no notice of the application, the building was burnt. The company were held in Ohio to be liable for the loss, though in the blank printed form which was filled up to make the application, it was stated that a policy would be issued if the application should be approved by the company;<sup>3</sup> their refusal to make out the policy, not being

<sup>1</sup> Woodruff v. Columbus Ins. Co. 5 La. Ann. 697.

<sup>2</sup> Hamilton v. Lycoming Mut. Ins. Co. 5 Penn. St. 339.

<sup>3</sup> Palm v. Medina Fire Ins. Co. 20 Ohio, 529. See also, Ins. Co. v. Johnson, 23 Penn. St. 72; Bentley v. Col.

Ins. Co. 17 N. Y. 421; Whitaker v. Farmers, &c. Ins. Co. 29 Barb. N. Y. 312; Peoria, &c. Ins. Co. v. Walser, 22 Ind. 73; Davenport v. Peoria, &c. Ins. Co. 17 Iowa, 276. In this case the agreement was made on the 20th, the building was burnt that night, and the

on the ground that the risk was objectionable, at the time of the application being accepted by the agent.

A policy was agreed for, and one made out differing from the agreement, and delivered to the clerk of the party proposed to be insured, who did not see it, and was not apprised of the variation until a loss had happened, and did not act accepting the policy as made out. It was held that the agreement remained in force, and that the applicant was entitled to such a policy as was agreed for.<sup>1</sup>

17. The question has arisen as to *what will amount to the consummation of an agreement for insurance between parties in different places communicating by letter or message.*

The doctrine must be the same, whether the inquiry relates to a contract of insurance or sale, or any other agreement not the subject of specific regulation in this respect. The question is, what is such an acceptance of an offer, as will bind the party accepting and the party offering; and what, if any, right of revocation of his offer or acceptance either party has, and within what time, and in what manner, he must avail himself of such right.

In case of inquiry made of insurers by letter, for the terms on which they would insure the vessel of the writer, for a specified voyage, they immediately answered by mail, naming the premium, but on the next day, having thought better of the matter, they wrote by mail revoking their offer and declining the risk. On the following day the applicant received their first letter, and on the same day replied, accepting the terms, and requesting them to fill up a policy for \$2500 or \$3000. After dispatching this letter, he received their second letter, revoking their offer. The court in Massachusetts held that the contract was not consummated, and that the insurers were not bound,<sup>2</sup> that is to say, that the party making the offer may revoke it if he takes the proper steps to give notice of his revocation at any time before receiving notice of its acceptance by the other party.

In a case in the Court of King's Bench in England,<sup>3</sup> not pre-policy was executed on the 21st, and dated the 20th, both parties being ignorant of the loss. The policy was held valid.

<sup>2</sup> M'Culloch v. Eagle Ins. Co. 1 Pick. Mass. 278.

<sup>3</sup> Adams v. Lindsell, 1 Barnew. & Ald. 681.

<sup>1</sup> Franklin Ins. Co. v. Hewitt, 3 B. Monr. Ky. 239.

cisely similar to the preceding one, but very closely analogous, it was, on the contrary, held that the party making the offer will be bound, if the party to whom it is made duly communicates notice of his acceptance. Lindsell, by letter, offered a lot of wool to Adams, saying he expected an answer by the course of post; but, through mistake in directing the letter, it was delayed. Lindsell, after not receiving an answer when he should have received one if his own letter had been transmitted as he supposed, and answered by course of mail, sold the wool to another, after which Adams's letter was received by him, accepting his offer, and dispatched in course of post after receipt of Lindsell's. The court considered that Lindsell was bound by his offer to the same effect as if his letter had gone direct, its delay being through his fault, and that it was a standing continuing offer up to the time of his letter being received by Adams, and thus held him to be answerable for a breach of his contract.

The circumstance in which these two cases differ is, that, in the Massachusetts case, the company immediately dispatched notice of their revocation to the other party; in the English case, Lindsell, though by the sale of the wool he showed distinctly that he intended to retract his offer, gave no such notice. Though the court do not expressly put stress upon this circumstance, yet we cannot say that such notice would have had no weight with them.

In a subsequent case,<sup>1</sup> in the English Court of Common Pleas, Mr. Chief Justice Best questioned the correctness of the decision in the Court of King's Bench; and in a subsequent case in Massachusetts, Mr. Chief Justice Shaw, giving the opinion of the court,<sup>2</sup> collaterally stated a proposition, that has been construed by a learned and able jurist<sup>3</sup> to import a renunciation of the doctrine previously adopted in that State. He said that, "when notice is to be given by mail, a notice actually put into the mail, especially if forwarded and beyond the control or revocation of the party sending it, may be good notice."

The point specifically decided was, that the acceptance of the offer had not been dispatched at the time of the fire, but remained in the hands of the applicant's agent, and subject to the appli-

<sup>1</sup> *Routledge v. Grant*, 3 Carr. & P. 267; S. C. 4 Bingh. 653.

<sup>2</sup> *Thayer v. Middlesex Mut. Fire Ins. Co.* 10 Pick. Mass. 326.

<sup>3</sup> 1 Duer, Mar. Ins. 121.

cant's control when the fire happened, and so, under the ordinary rule in such case, the policy would not have been binding upon the insurance company, if, without having had notice of the loss, they had issued one. The remark of the chief justice, however, considering the facts to which it had reference, certainly indicates a different doctrine from that of the previous case in the same court, though consisting in part of different judges.<sup>1</sup>

The case of a contract for insurance evidently differs from notices on bills and the like, and would be subject to a new and embarrassing question, where there should be a telegraphic communication.

This same question has come up in a New York case relative to a contract of sale.<sup>2</sup> Frith, December 24th, offered by letter a quantity of brandy to Mactier the intestate, upon specified terms, who, March 25th, dispatched a letter accepting the offer, and died on the 10th of April, before his letter had come to the hands of Frith. The question was, whether the contract was consummated on Mactier's dispatching his acceptance, or his acceptance remained revocable until it should be received, for if it did so, it was revoked by his death. Mr. Justice Marcy gave a learned and elaborate opinion in the Court of Errors, that the contract was consummated, and bound Frith from the time of Mactier's dispatching his letter of acceptance; and a majority of the court, a part of whom only were jurists, concurred in this opinion.<sup>3</sup>

In a case before the Supreme Court of the United States, the

<sup>1</sup> In respect to the doctrine, that a party may retract any time before receiving notice of the other's assent, the English Court of King's Bench objects that, if the insurer is not bound by his offer until he has received notice of its acceptance, but in the interval may retract it, the applicant cannot be bound by his acceptance until he has received notice that it has been assented to by the insurer; nor, again, the insurer until he has received notice that his assent to the acceptance has been assented to by the applicant, and so the parties might go on corresponding indefinitely, each retracting before the other had ac-

cepted, and thus the negotiation might continue and never come to any result. *Adams v. Lindsell*, 1 Barnew. & Ald. 681. This reason is adopted by Gibson, C. J., of the Supreme Court of Pennsylvania; *Hamilton v. Lycoming Mut. Ins. Co.* 5 Penn. St. 339, at p. 342, and by Judge Duer, 1 Mar. Ins. 68. This is merely supposing a very improbable contingency, which, admitting that it might happen, does not seem to be a conclusive objection.

<sup>2</sup> *Mactier's Administrators v. Frith*, 6 Wend. N. Y. 104.

<sup>3</sup> See also *Brisban v. Boyd*, 4 Paige, N. Y. 20.



agent in Fredericksburg, Virginia, of a Baltimore fire insurance company, in reply to an application for a policy, had by instruction from his company, on the 2d of December, stated the terms on which they would make a policy, by letter addressed to the applicant; and the applicant, then in Alabama, on the 21st of that month, the day after receiving the agent's letter, put his letter of acceptance of their terms, inclosing a check for the premium, into the post-office, addressed to the agent. On the next day, namely, the 22d of the same month, the dwelling-house in Fredericksburg, on which the insurance was proposed, was burnt. The agent received the letter of acceptance, inclosing the check for the premium, on the 31st, and immediately replied, declining, on behalf of the company, to take the risk. In a bill in equity for relief upon this correspondence, as an agreement to make a policy, it was decided that, on the letter of the applicant being put into the mail in Alabama, the agreement for the insurance was completed, subject to the contingency of the applicant's remanding his letter, or giving notice of his revocation of his acceptance, so as to reach the agent before the receipt of his letter of acceptance of the terms offered.<sup>1</sup>

These cases sufficiently show the difficulty and subtilty of this question. Pothier's doctrine<sup>2</sup> is, that, if the party to whom an offer is held out sustains damage by its being revoked, while he is reasonably relying and acting upon it, his remedy should be an action for the breach of good faith, not one alleging the contract.<sup>3</sup>

His opinion accordingly coincides with most of the decisions above cited.

The doctrine decidedly predominating in the cases, accordingly, is, that *a written offer by insurers of terms on which they will insure, where the subject, risks, and terms are adequately specified, becomes binding on a dispatch of an acceptance, provided the*

<sup>1</sup> *Taylor v. Merch. Fire Ins. Co.* 9 How. 390. See also remarks of Gibson, C. J., *Hamilton v. Lycoming Mut. Ins. Co.* 5 Penn. St. 339, at p. 342.

<sup>2</sup> *Traité du Contrat du Vent*, s. 2, a. 3, no. 32.

<sup>3</sup> See 1 Duer, *Mar. Ins.*, 127-129. Also 1 Maule & S. 95; 2 Ves. jun. 118; *Cooke v. Oxley*, 3 Term, 653. See also *Humphries v. Carvalho*, 16 East, 45,

for remarks on *Cooke v. Oxley*, which is incorrectly reported; also *Eyles v. Ellis*, 4 Bingh. 112; *Head v. Diggon*, 3 Man. & R. 97; *Dig. lib.* 17, tit. 1, s. 15; and 1 Duer, *Mar. Ins.* p. 67, s. 13, and p. 116, n. ix., where this subject is very learnedly and ably treated, to whom I am indebted for some of the above references.



*acceptance reaches them prior to a letter countermanding it, and in reasonable time, or within the time prescribed.*

18. *Where an applicant applies by mail for a policy in certain terms, and transmits the premium note, and the insurers fill up and transmit by mail a policy in different terms, saying they accept his proposition, it is not an agreement, as the minds of the parties do not concur, and the applicant is not liable on his note.*

Carrington applied to a company for their terms for a policy "on horses and oxen, on board the Gleaner, from Saybrook to the West Indies." The company replied, "The office will take the risk at 15 per cent." Carrington replied by mail the next day, "We accept your terms, wish a policy filled on 26 horses, valued at \$2200 dollars, and on 20 oxen, valued at 300 dollars. Inclosed is a note for the premium." The company on the next day forwarded by mail a policy for "3000 dollars, on stock on the deck of the brig Gleaner;" with this note on the margin:—"46 head of horses and oxen valued at 3000." Carrington refused to accept the policy, on account of the stock being valued together at one sum, instead of a separate valuation of the two descriptions of stock, and immediately returned it to the company.

In a suit in Connecticut on the premium note, Hosmer, C. J., said, that the second letter of Carrington was in effect a new proposal, as it specified the amount and mode of valuation, which were not in his first letter. "This was a new proposal, which Carrington might presume the company would accept, but could not know it. The office had assumed no such obligation, as the office had not agreed to underwrite a valued policy; neither had the defendants agreed to receive an open policy. The minds of the parties had not met. The parties never did agree."

Three of the judges concurring in this opinion, judgment was given against the right to recover on the premium note. Mr. Justice Bristol dissented.<sup>1</sup>

19. *There is no difference in respect to the completion and validity of an agreement for an insurance, whether it be for a marine, life, or fire policy.*

20. *Where an agreement for insurance is made by an agent,*

<sup>1</sup> The Ocean Ins. Co. v. Carrington, 3 Conn. 357. Carrington had heard of the arrival of the vessel before writing his second letter. Nor is the company liable for a loss in such a case where the application was made through the company's agent. Myers v. Keystone Ins. Co. 27 Penn. St. 268.

*it must, in order to bind his principal, be made within his authority.*

The Washington Insurance Company in New York were in the practice of taking risks against fire at Savannah, in Georgia, and had taken divers risks procured, and for which the premium had been forwarded by R., their agent at Savannah. The agent having had a negotiation with P. respecting an insurance on his stock of goods, on the 5th of January, 1820, received from him the premium for the insurance of \$5000, to commence from that day, for which he gave P. a receipt, as agent. On the 11th of January, and before the company had received the premium in New York, or made out the policy, the property was burnt. The agent had previously written to the company, that, at so great a distance, "there was difficulty in getting along with insurances, unless the company would furnish him with blank policies ready signed, or his receipt for the premium was made binding upon the company." The secretary answered, that "the directors were aware of the difficulty, and would obviate it so far as was consistent with the principle, that no insurance should be binding until the premium had been received by them in New York." The president also replied to him, that "the most that could be done was, that all insurances he might agree to make, and for which the premium should be actually paid, and received in New York, the office would consider as insuring at the time of the payment to the agent, provided the company should be satisfied with the risk."

The printed conditions and proposals of the company, put up in R.'s counting-room, specified, among other things, that "applications for insurance must be made at the office of the company." In April, 1821, P. tendered the amount of the premium to the company in New York.

Mr. Chancellor Kent was of opinion, that no ground was shown for any one to suppose that the agent was authorized to bind the company to insure, or that he intended to bind them; and that they would not be bound until after receiving the premium in New York, and giving their assent to the proposals; and he decreed accordingly.<sup>1</sup> The case being carried to the Court of Errors, Mr. Justice Woodworth, with the concurrence of Mr. Chief Justice Savage and Mr. Justice Sutherland, said: "Upon

<sup>1</sup> Perkins v. Washington Ins. Co. 6 Johns. Ch. N. Y. 485.

the payment of the premium to the agent, the applicant for insurance was subject to the following contingencies: 1. That the premium should be received at the office. 2. That the rate of premium should be recognized at the office. 3. That the company should be otherwise satisfied with the risk. As to the first, there can be no doubt. As to the second, it was undoubtedly intended, that, if the rate of premium taken by the agent conformed to the rules and regulations of the company, and was not less than the uniform rate before taken in other and similar cases, the applicant would be entitled to a policy commencing on the day the premium was paid; for, although it is provided that the office shall recognize the rate of premium, it must be understood as having referred to the rules and regulations sanctioned by the board."

Mr. Senator Colden, a judge in the same court, considered the agent of the company to be such for remitting the premium; and since, if he had immediately remitted it in this case, the company would have received it before the news of the fire reached them, and have made the policy, they should not be permitted to take advantage of his delay.

The court were unanimously of opinion, that the plaintiff was entitled to recover.<sup>1</sup>

On the same question the following case has been decided in Massachusetts. On the 15th of January a proposal was made in behalf of Thayer to a mutual fire insurance company at Concord, to insure buildings in Hopkinton, where he resided, distant about twenty miles. The directors stated the terms on which they would take the risk, and the secretary of the company filled out proposals, and a premium note, both dated on the 16th of January. All the blanks in these proposals were filled up by the secretary, excepting that for the value of the buildings, which was left to be filled up by Thayer, the negotiation being made by his agent, Harrington, from whose description the secretary had filled up the proposals. The secretary told Harrington, that, when the premium note and proposals were signed by Thayer, they might be returned to him, the secretary, by mail or otherwise, and he would then return the policy bearing the same date with the note and proposal. There was a weekly mail between Hopkinton and Concord. Harrington presented the papers to Thayer, at

<sup>1</sup> Perkins v. Washington Ins. Co. 4 Cow. N. Y. 645.

Hopkinton, on the 28th of January, two mails having gone thence to Concord after the 15th. Thayer signed the proposal without filling up the blank for the value. He also signed the premium note, and on the 28th gave the papers to Harrington, who was postmaster at Hopkinton, to be forwarded to Concord by the next mail, on the 3d of February. On the 31st of January, the buildings were burnt. On the 3d of February, Harrington forwarded the papers by mail, and they were duly received by the secretary. Mr. C. J. Shaw, giving the opinion of the court on the question whether this was an agreement to insure, said: "The proceedings at Concord did not purport to be a contract, and were not understood so to do. Harrington was not authorized to make insurance." And though the chief justice intimates that, where a notice is actually put into the mail, especially if forwarded and beyond the control or revocation of the party forwarding it, it may be a good notice, the court were of opinion that the company was not bound in this case, because the acceptance of the offer of the company, if it were such, and the papers signifying it, were still in the hands of the postmaster, who was the agent of Thayer, and had not been forwarded, at the time of the buildings being burnt.<sup>1</sup>

21. *An offer to insure is not binding upon the party making it, unless it is accepted within a reasonable time.*<sup>2</sup> And if the time or place of acceptance is prescribed, the answer must be in conformity.<sup>3</sup> A proposal is not presumed to be accepted from a delay for five months to reply.<sup>4</sup>

#### SECTION IV. THE EXECUTION OF THE CONTRACT.

22. There is nothing to distinguish the execution of the contract of insurance from that of other written instruments. Though a *policy* is a contract between two parties, each of whom is under certain obligations, and entitled to demand of the other a compliance with certain implied and expressed conditions and stipulations, it is *subscribed only by the insurer himself, or by his agent or attorney, and when so subscribed and actually or constructively*

<sup>1</sup> Thayer v. Middlesex Mut. Fire Ins. Co. 10 Pick. Mass. 326.

<sup>2</sup> Ibid. Xenos v. Wickham, 13 C. B. n. s. 381.

<sup>3</sup> Eliason v. Henshaw, 4 Wheat. 225, and cases above cited.

<sup>4</sup> Ins. Co. v. Johnson, 23 Penn. St. 72.



*delivered, unconditionally,<sup>1</sup> to the assured, it is a completed and binding contract.<sup>2</sup>*

23. *In the usual form of the policy the insurer on a marine risk acknowledges payment of premium, and, in fire and life policies, of the whole or first annual premium, or deposit or first instalment, and accordingly always imports a settlement by cash or premium note, of a part of the whole of the premium simultaneously with the execution and delivery of the policy.* This is equivalent to saying, that the contract is not in force until such payment or settlement has been made.

24. *But the rules of an insurance company, or the agreement of the parties, may control the rule just stated, and the policy be binding upon the insurers, though the premium has not been paid or any note given for it, nor the policy actually delivered from the insurance office.<sup>3</sup>*

Thus, in a case that occurred in Maine, Loring, one of the owners of a vessel, applied, November 5th, in Portland, for insurance on the vessel, and the terms were agreed upon, and he signed the proposition-book, which was considered in the course of business at the office to entitle the applicant to a policy, though the premium note had not been signed, the frequent practice being to fill up the policy immediately, and let it remain in the office for the benefit of the applicant, and persons insured frequently did not call and give their premium notes, and take away their policies, until the time of credit on the note to be given had nearly expired. Four or five days after, the applicant called again at the office, and was told by the president that his policy was ready, and he then took a premium note filled up at the office, to get it signed by the three other owners, for whom he was not authorized to sign, and, who, as well as himself, resided out of the city. On the 6th of December, the president of the office met Loring, and requested him to call and take his policy, which he replied that he would do at some other time. On the 9th, news of a loss was received at Portland, and then known to both parties. Two days afterwards, Loring offered the premium note at

<sup>1</sup> *Lynn v. Burgoyne*, 13 B. Monr. 400. accepted by the assured. *Wallingford v. Home Ins. Co.* 30 Mo. 46.

<sup>2</sup> *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96. If the policy does not correspond with the application, it must be <sup>3</sup> *Warren v. Ocean Ins. Co.* 16 Me. 439.



the office, duly signed, which the president declined to accept, and refused to deliver the policy. The policy contained the usual acknowledgment of the payment of the premium. It was held that the contract had been executed, and was available to the assured as a valid insurance.<sup>1</sup>

It has been held in the Circuit Court of the United States for Pennsylvania, by Mr. Justice Washington, in an action of trover for a policy, that an agreement for an insurance was executed on the part of the underwriters, by their causing the policy to be filled up, and subscribing it, and giving to the applicant notice of its being filled up, mentioning at the same time intelligence received of the capture of the vessel, though the policy still remained in their office, and the premium had not been paid, nor had any note been given for it.<sup>2</sup>

It does not appear in this case that the underwriters had signified their dissent until the agent of the assured had called at their office, and offered to sign the premium note. If this offer be considered to be equivalent to the actual signature of the note with the assent of the underwriters, or if the agreement for the policy, which was probably merely verbal, no mention being made of its being written, is considered to be binding on the parties, then there seems to be no question of the liability of the underwriters, though, if their liability rested wholly on the agreement, the remedy would seem to have been more properly on that. The circumstance of the policy remaining in the office cannot be material, if the premium has been paid, and the policy is considered to be subject to the order of the assured.

In this case, the doctrine as to the acts requisite to the complete execution by the underwriters of the agreement to insure by their having executed a policy, is certainly pushed very far. Suppose the applicant had subscribed his premium note at his own counting-room, could the underwriters have maintained trover for it? Perhaps Judge Washington put greater stress upon the

<sup>1</sup> *Loring v. Proctor*, 26 Me. 18; *Blanchard v. Waite*, 28 Me. 51. Each owner was separately insured by each of the twenty members of the insurance company, according to the terms of the policy and the rules of the association of insurers.

<sup>2</sup> *Kohne v. Ins. Co. of N. America*, 1 Wash. C. C. 93. See also *Bragdon v. Appleton, &c. Ins. Co.* 42 Me. 259; *Sheldon v. Conn. M. Ins. Co.* 25 Conn. 207; *Hallock v. Ins. Co.* 2 Dutch. N. J. 268.

notice that the policy was filled up, than appears in his report of the case. It may possibly have been such as to admit of the construction that the underwriters acknowledged that they held a policy belonging to the assured, and waived the previous payment of the premium, or delivery of his note therefor, as a preliminary essential to the consummation of the contract.

Where it was notified to the applicant, upon whose application the secretary had minuted the rate of the premium but not signed the minute, that the insurance would not be considered to be in force until the premium should be paid, it was held in Louisiana that no contract existed between the parties so long as the premium remained unpaid, though the policy was in the office, filled up and signed, when the loss occurred, and policies for the same party had previously been treated as being in force, though they remained in the office and no premium had been paid.<sup>1</sup>

25. *Where a policy, as often happens, is delivered subsequently to its date, the risk is presumed to have been assumed from that date, to the same effect as if then delivered, no reason appearing for a different construction.*<sup>2</sup>

26. Insurance is often negotiated through an agency for one or both of the parties. *It is necessary to the validity of such a contract, that the agent acting for either party should be previously authorized, or the contract subsequently ratified and adopted by the principal, or that the purported principal should have given the other party sufficient ground to believe the person assuming to be agent to have been duly authorized as such.*<sup>3</sup>

Where a policy was delivered by an agent of a fire insurance company before his agency was revoked, it was held to be valid and binding on the company, though the assured had prior notice of their intention to revoke it.<sup>4</sup>

27. A policy in which the value of the subject is stated is called a "VALUED POLICY," one in which it is not stated is an "OPEN POLICY."

The expression "open policy" is also sometimes used in reference to one kept open for new subscriptions, or one on cargo kept

<sup>1</sup> Berthoud v. Atlantic Ins. Co. 13 La. 539. See also Flindt v. Ohio Ins. Co. 8 Ohio, 505.

<sup>2</sup> Lightbody v. North American Ins. Co. 23 Wend. N. Y. 18.

<sup>3</sup> See chap. iv.

<sup>4</sup> Lightbody v. North American Ins. Co. 23 Wend. N. Y. 18.

open for new subjects of insurance, in which latter case the voyage and risks are described in the body of the policy, and additional amounts or new cargoes are afterwards entered, from time to time, at the foot of the instrument, by merely specifying the amount,<sup>1</sup> or by naming a different vessel, or specifying whatever circumstance distinguishes the risk or subject from those described in the body of the policy.

## SECTION V. THE PROVISIONS OF A COMMERCIAL POLICY.

28. *The party really interested as the assured in a marine policy does not always appear on the face of the instrument.* The policy is executed only by the insurer. The party insured is most frequently named in the policy, but not always, for it may be made by the party named for his own benefit, and is often made by him as agent or trustee, in which case the party interested is named; or, if not, the agent describes himself to be such, or the policy is declared to be made for the benefit of whom it may concern, or contains some indication of the interest of another party than the one named.

29. *Policies always bear a date, but proof by parol, or otherwise aliunde, is admissible to show that a policy, or other written instrument, was executed and delivered and became a binding contract, on a different day from its date,*<sup>2</sup> which is an exception to the general rule that the provisions of a written instrument cannot be superseded by parol testimony.<sup>3</sup>

30. *The essential stipulation is usually, at least, if not invariably and universally, expressed by the word "insure."*

31. *The thing insured, the "subject," as, ship, freight, cargo, profits, commissions, must necessarily appear on the face of the policy.*

The quantity or amount of these subjects, other than the vessel, may be uncertain, in which case the policy is applied to whatever there may be at risk, not exceeding the amount or quantity expressed in the policy.

<sup>1</sup> Form of the Atlantic Mutual Insurance Co. New York.

<sup>2</sup> *Stone v. Ball*, 3 Lev. 348; *Hall v. Cazanove*, 4 East, 477; *Jackson v. Bard*, 4 Johns. N. Y. 320; 1 Duer, Mar. Ins. 90.

<sup>3</sup> The French Code of Commerce, a. 332, requires that the date of the execution of the contract shall be truly expressed.

32. In the United States, marine *policies* uniformly contain the provision that they *are to be applicable only to the excess of the value of the subject over the amount insured by prior policies*, and in respect of subsequent insurances, the policy is to be applied as if no such had been made.

33. *The value of the subject* as so much in the whole, or per hundred-weight, yard, or piece, etc., *is sometimes declared* in the policy; and, *where it is not so, the value in the market* at the beginning of the risk *is understood* to be referred to by the parties.<sup>1</sup>

A policy on cargo is not unfrequently applicable to successive shipments, coming within the description of subject specified.

34. *The premium is always named.*

35. *The risks*, or perils, or causes of loss for which indemnity is promised, *must be specified.*

These are usually perils of the seas, fire, public enemies, thieves; captures, restraints, and detentions, by governments or people; and barratry of the master and mariners; and all other perils.

The first of these descriptions, namely, "perils of the seas," is the most comprehensive. It includes all the others, while the subject is off land, except the last, which has very little practical effect, since it can be applied only to perils of the like kind to those specifically enumerated, and the clause is very rarely relied upon by parties, and still less by the courts.<sup>2</sup>

36. *The risks specified in the policy are qualified, and limited*

<sup>1</sup> A Lexington form of commercial policy provides respecting valuation, that in case of loss the insurers shall be liable according to the value of like goods at the port of destination.

<sup>2</sup> There is some diversity in the enumeration of perils in the common forms of policies of different places.

The old and the present enumeration in English policies is, "perils of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people, of what nation, condition or quality soever, barratry of the master and mariners, and all other perils."

Some American companies adopt this enumeration, exactly or very nearly, as the Atlantic, Sun, Union, Mutual, and Mercantile Mutual, of New York. The Boston forms, that of the Charleston Insurance Company, and the Lexington Life and Marine Insurance Company, and others, for "thieves" substitute "assailing thieves;" and some (the New York Mercantile and Charleston Commercial and some others) "overpowering thieves," intending to take the risk only when it comes within the description of "superior force." Some omit "rovers," "letter of mart and countermart," "surprisals," "takings at sea," and "arrests," on the supposition that they are included in "perils of the sea," which, no doubt,



*or enlarged, by the description of the voyage, adventure, or employment of the ship, or the designation of the species of trade to which the insurance relates.* So the place where the insurance is made, as we shall see, affects its construction, since every contract must be construed in reference to the customs and usages of the country, and even the port where it is entered into, as well as by the subject-matter to which it relates, and the surrounding circumstances. Such customs and usages are in effect included in the contract, and, as will more fully appear in the sequel, have a material bearing in respect to the character and extent of the risks and perils included in the insurance.

The established printed form of marine policy used in Great Britain has a clause expressly referring to usage, whereby it is declared that it "shall have as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, the Royal Exchange, or elsewhere, in London." Similar clauses have been sometimes introduced into American policies, usually, however, for the purpose of circumscribing rather than enlarging

cover all losses from superior force, while the subject, whether ship, freight, or cargo, is at sea; but the risk on each subject is, under many policies, intended to be covered when it is not strictly at sea, as on the ship when, in the course of the voyage, it is hauled up for repairs, and so on for freight, and on goods also, when, in the prosecution of the voyage, they are temporarily on hand. Therefore, it is safer to specify, in the general form of marine policies, losses, by fire, and all losses, intended to be covered, that happen from superior force, by other words than "perils of the sea."

The word "jettisons" is omitted in the Boston form, for the reason that, when a jettison is made on account of any one of the perils insured against by a policy, indemnity for it may be claimed under such peril, and is impliedly included in the stipulations common to marine policies respecting general and particular average, and also comes within "perils of the sea," where that

phrase is used; but if it is not made on account of any peril insured against, then it is not intended to be covered, and so the term "jettisons" may well be omitted in the specific enumeration of perils in the general form of marine policies, if averages are expressed or implied.

The risk of "barratry by the master or mariners," is taken by some companies without any words of qualification. In the Boston forms of policy the risk of barratry is not insured against if the insurance is for the owner of the vessel. This qualification of the risk arises from the fact, that the master is appointed by the assured himself, and it is supposed that he will be more circumspect in employing a master, when the dishonesty of the person whom he employs is at his own risk. The Fire and Marine Insurance Company of Baltimore and the South Carolina Insurance Company of Charleston, except the barratry of the master if he is consignee.



the risks assumed by the insurer ;<sup>1</sup> but every such clause is wholly superfluous, as we shall see, since the contract itself, by legal construction, and without any express provision, provides for the cases intended to be provided for by a general clause of this description.

Provisions are ordinarily introduced in filling up marine policies, for the purpose of limiting, enlarging, or otherwise qualifying, the risks enumerated in the printed form, where such qualifications are intended by the parties.

37. *The description of the risk always specifies its commencement and termination, by time or place, or both, or by some event.*

The more usual commencement of the risk on a marine policy is, "at and from," or "from," a certain place ; and its continuance on a certain voyage outward or homeward, or both outward and homeward, to a certain place, on the vessel until it is moored twenty-four hours in safety, and usually on goods until they are safely landed.

But *in the coasting trade*, or on successive short voyages, and in uncertain employments, *the policy on the vessel is usually made for a certain period*, beginning on a certain day, and ending on a certain other, at noon ; and such a policy is called a TIME POLICY. It is often stipulated, that, if the vessel is at sea at the end of the specified period, the risk is to continue at the same rate of premium until its arrival at some port.

38. *It is one of the understood conditions of a marine policy, that, if the subject is not put at risk within the terms of the policy, the premium will not be due*, or if paid, will be returnable. Such return is often expressly stipulated for.

89. A marine policy is subject to the following *implied conditions* relative to the risk, to be complied with by the assured :—

1st. *The ship must be sea-worthy.*

2d. *The assured must not make any material misrepresentation*, whether written or oral, relative to the risk, importing that it is less than it really is.

3d. *The assured must state to the insurer every fact known to him that is material to the risk, and which is not known to the insurer, or presumed to be so.*

If the assured fails to comply with either of these implied conditions, the policy is void from the first.

4th. *The vessel must not deviate from the voyage, so as to sub.*

<sup>1</sup> Boston form.

stitute another risk than that described in the policy. If this condition is not complied with, the policy ceases to be of force thereafter.

40. Where the risk is to begin on the shipment of goods, sailing on a voyage, or on any event or circumstance which it is not obviously to be presumed may be distant in time, it is an *implied condition that the risk shall begin within a reasonable time.*

41. It is an implied exception to the risks insured against in every marine policy, that *the assured is not entitled to indemnity for loss incurred by his own fraud or gross fault, or his violation of law.*

42. *The risk of illicit, prohibited, and contraband trade is expressly excepted in American policies generally; which exception does not appear in the common English printed form.*

43. *The provision is common to both English and American policies, and the old as well as the recent, that in case of disaster the assured may labor, travel, and sue for the safeguard and recovery of the property, for the expense of which the insurer shall contribute in the proportion of the amount insured by him to that of the whole property at risk.*

44. A new and mutually advantageous stipulation was added to American policies in 1825 and subsequently, that *acts, of either the assured or insurer, to recover or save the property, shall not be construed to be a waiver or acceptance of an abandonment.*

45. The American forms generally provide, in case of the *blockade of the port of destination*, that the assured shall not abandon, but that the vessel may enter a neighboring port, and wait for the blockade to be raised, or discharge the cargo and end the voyage there.

46. The unsatisfactory *decisions of some colonial and consular courts of admiralty*, between 1790 and 1814, were the occasion of a stipulation in many American policies, that the adjudications by such courts should *not be conclusive* of the facts adjudged, as between the parties.

47. It is a frequent provision, that, in case of the *assignment of the policy without the consent* of the underwriter, it shall be void.

48. It is a rule in the United States, though not in England, that damage or loss exceeding half of the value of the subject, gives the assured a right to assign what remains to the underwriter, and to be paid the whole amount insured on the subject.

A question has arisen in divers cases, *whether the value intended by this rule is that at which the subject is rated in the policy, or its actual value in the market at the time of the loss.* This is a material question, since the repairs of a damaged ship may cost more than the ship will be worth when repaired, and yet be less than half of the amount of its value by the policy. This question has given rise to a stipulation in some policies, *that the assured shall not have the right to recover for a total loss on account of damage merely, unless the loss adjusted as a partial one exceeds one half of the amount at which the subject is insured by the policy.*<sup>1</sup> And a like construction has been put in some cases upon a policy not containing such a provision.

49. We shall see hereafter more particularly, that, where the insurer pays to the assured the whole sum insured on the subject, he is entitled to the remnants of it, so far as he insures it, which, or the proceeds thereof, usually come into the hands of the assured. Some policies provide *that the assured, in accounting to the underwriters for these remnants or proceeds, shall not make any deduction for the wages earned, or services rendered by the officers or crew previous to the loss, whether allowed to them under the name of wages or otherwise.*<sup>2</sup>

50. It is a general custom, in adjusting losses on the vessel, *to deduct one third of the expense of labor and new materials in repairing* or replacing parts of the vessel injured or destroyed by the perils insured against, on account of the new or repaired part being better than the old. This is designated THE ALLOWANCE OF A THIRD FOR NEW. It is understood as being not applicable to a new anchor, and heretofore was not applied to a new chain-cable, this exception being made, when such cables were first introduced, for the purpose of encouraging the introduction of them, but the third is now deducted. The deduction is not made by some underwriters on copper sheathing during the first voyage. A particular stipulation has been introduced into some forms of policy, that, instead of the allowance of a third for new, the expense of recoppering shall be subject to the deduction of two and a half per cent. for each month after the vessel has been coppered, from the net expense of recoppering, over and above the proceeds of the old copper sheathing and nails, which, of course, exonerates

<sup>1</sup> Boston form.

Western inland trade contain a similar

<sup>2</sup> Boston form. Policies upon the provision.

the insurer from all expense for recoppering, after the fortieth month.<sup>1</sup>

51. The premium on a marine insurance is, in the United States, usually paid by promissory note, and it is generally stipulated, that, *in case of loss*, this *premium note*, if unpaid, shall be *deducted*,<sup>2</sup> and the provision for *set-off* is usually *extended to all demands of the underwriters against the assured*.

52. Some forms provide that the assured shall not abandon and claim for a total loss, on account of capture or detention, until proof is given of condemnation, or detention for ninety days.<sup>3</sup>

This provision seems to be omitted in the New York and Baltimore forms in time of peace.<sup>4</sup>

53. Where less property is put at risk than the amount insured, it is the practice to return the premium that has been paid on the deficiency, reserving in some places one quarter,<sup>5</sup> in others one half,<sup>6</sup> of one per cent. on the amount not put at risk, and in others<sup>7</sup> ten per cent. of the amount of the premium, which will be in some cases more, in others less, than a quarter or half of one per cent. on the amount insured, according as the rate of premium is high or low.

54. All marine policies exempt the underwriters from all loss, except total, or such as is a subject of contribution on certain articles; and from loss by damage under certain specified rates on certain other enumerated articles; and from such loss under a certain other rate on the ship, cargo, or freight. The specific exceptions are inserted in English, and in some American policies, under a memorandum, or N. B., and thence the articles specified are called "*memorandum articles*," and the body of exceptions taken together, "*the memorandum*."

The reason of these specific exceptions is the great liability of such articles to damage from slight causes, insomuch that it is not easy to discriminate damage by ordinary causes from that resulting from the extraordinary operation of the perils insured

<sup>1</sup> A Boston form. The policy of the South Carolina Insurance Company of Charleston provides for a similar deduction for each month.

<sup>2</sup> New York, Philadelphia, and Baltimore forms.

<sup>3</sup> Boston, New York, and Philadelphia forms.

<sup>4</sup> The form of the South Carolina Insurance Company of Charleston, on cargo, provides against abandonment for capture or detention, except in case of condemnation.

<sup>5</sup> Baltimore and Charleston forms.

<sup>6</sup> Boston and New York forms.

<sup>7</sup> Philadelphia form.



against, which latter cause of loss, as will be subsequently seen, is the only one against which the assured is entitled to indemnity. Accordingly, these specific exceptions are introduced as one test of the operation of the peril being extraordinary.

There is a great variety in the lists of memorandum articles presented in the common forms of policies used in different ports, and also in the degree of damage at which the liability of the underwriter begins.

A much greater number of articles appear in the printed American forms of policies than in the English, but the printed form does not fully present the practice of the several offices, since each one has rules of its own, and introduces exceptions of losses in any particular case at discretion.<sup>1</sup>

<sup>1</sup> The memorandum articles of the London form of policy used at Lloyd's, which is generally adopted in Great Britain, (1 Arnould, Ins. 21,) and those found in the forms used in Boston, New York, Buffalo, Philadelphia, Baltimore, Charleston, Cincinnati, and Lexington, which sufficiently represent the American forms, are given below, where the figures express the rate per cent. of loss under which the insurer is not liable for particular average. Thus 100 indicates that the insurers are liable only for a total loss; 20, that they are liable only in case of damage to the amount of twenty per cent. of the value of the article, &c., always excepting general average, which all the forms agree in allowing, at whatever rate. The particular qualifications of the exceptions, as whether an article is in bags or casks, &c., are not in all cases noted.

Bacon. Cincinnati Ins. Co. and Charleston Com. Ins. Co. 10.

Bread. Charleston, Boston and New York, 7; Philadelphia, 15; Baltimore and Cincinnati, 10; Lexington, 100.

Books and Stationery. Cincinnati Ins. Co. 20; Charleston Com. Ins. Co. 10.

Bags, bagging. New York, 100; Philadelphia, 100, or if by stranding, 20 on aggregate; Baltimore, 20; Cin-

cinnati, 20; Charleston Com. Ins. Co. 100; South Carolina Ins. Co. 100; Lexington Ins. Co. 100.

Beans. Baltimore, in bulk, 100; in casks or bags, 10; Cincinnati Ins. Co. 20; Charleston Com. Ins. Co. 100.

Butter. Lexington Ins. Co. 100.

Cars, railroad. Charleston Com. Ins. Co. 100.

Cigars. Cincinnati, 20.

Cheese. New York, 100; Philadelphia, 100, or if by stranding, 20 on aggregate; Lexington Ins. Co. and Charleston Ins. Co. 100.

Carriages, pleasure. New York, 100; Philadelphia, 100, or if by stranding, 20 on aggregate; Baltimore, Lexington, Charleston Ins. Co. and Com. Ins. Co. of Charleston, 100; Cincinnati, 10.

Cassia, not in boxes. New York, 20; Philadelphia, 15; Baltimore, 20; Cincinnati, 20; South Carolina and Charleston Commercial, 20.

Coffee, in bags or bulk. New York, 10; Philadelphia, 7 on aggregate; Baltimore, in bags, 7, in bulk, 100; Cincinnati and Charleston Commercial, 10; South Carolina Ins. Co. and Charleston Com. Ins. Co. 100.

Cocoa. Baltimore, in bags, 7; Charleston and Charleston Commercial, 10.



55. Some printed forms prescribe to *the manner of applying the memorandum*, that is, whether a loss, in order to be payable, must

Clothing. Charleston Commercial, 100.

Crockery and Glass Ware. Charleston Com. Ins. Co. 10.

Corn. Cincinnati, 10.

Cotton. Lexington, 10.

Fish. England, Boston, and New York, 100, or if by stranding, 7 on aggregate; Philadelphia, Baltimore, Lexington, South Carolina, Charleston, and Charleston Com. 100.

Flaxseed. England, 100; Boston, 7; New York, 7; Baltimore, 7. See Seed.

Flax. England, 5; Boston, 20; New York, 8; Philadelphia, 7; Baltimore, 20; Charleston, 20 and 7.

Fruit. Boston, 100, or if by stranding, 7; New York, 100; Philadelphia, 100, or if by stranding, 20; Baltimore, 100; Charleston, 100.

Furniture, household. New York, 100; Philadelphia, 100, or if by stranding, 20 on aggregate; Baltimore, 100; Charleston, 100; Cincinnati, 100.

Flour. Charleston, 100 and 10.

Furs. Lexington, 100.

Grain. England, 8; Boston, 100, or if by stranding, 7 on aggregate; New York, Philadelphia, Baltimore, and Charleston, 100.

Gunny-bags. Charleston Com. Ins. Co. 10.

Hemp. England, 5; Boston, 20 on whole aggregate; New York, 20; Philadelphia and Lexington, 15; Baltimore, Cincinnati, and Charleston, 20.

Hides and Skins. England, 5; Boston, 100, or if by stranding, 7 on aggregate; New York, 100; Philadelphia, 100, or if by stranding, 20; Baltimore, 100; Lexington and Charleston, 100.

Hempen Yarn. New York, 100; Philadelphia, 100, or if by stranding, 20 on aggregate; Baltimore, 100; Charleston, 100.

Hops. Charleston Com. Ins. Co. 100.

Iron. Boston, New York, Philadelphia, and Baltimore, in bars, bundles, rods, hoops, or plates, 100; Charleston Ins. Co., if by wet or rust, 100; Cincinnati, 20.

Indian Meal. New York, 100; Philadelphia, 15 on aggregate; Baltimore, 100 if not in casks, 10 if in casks; Charleston, 100 and 20.

Ice. Charleston Ins. Co. 100.

Jerked Beef. Charleston Com. Ins. Co. 100.

Lard. Lexington, 100.

Looking-Glasses. New York, 100; Philadelphia, 100, or if by stranding, 20 on aggregate; Baltimore and Charleston, 100.

Liquids. Baltimore, in casks, 10.

Machinery. Charleston Com. Ins. Co. 100, if by rust.

Madder. New York, Philadelphia, Baltimore, and Charleston, 100; Cincinnati, 10.

Musical Instruments. New York, 100; Philadelphia, 100, or if by stranding, 20 on aggregate; Baltimore, 100; Lexington and Charleston, 100.

Matting. New York, 20; Philadelphia, 15; Baltimore, 20; Cincinnati, 10; Charleston Com. Ins. Co. 20.

Nuts. Cincinnati, 10.

Oil-cloth. Cincinnati, 10.

Osnaburgs. Charleston Ins. Co. 100.

Paintings. Charleston Com. Ins. Co. 100; Cincinnati, 20.

Palmleaf. Charleston Com. Ins. Co. 20.

Paper. Cincinnati, 20.

Paper-hangings. Cincinnati, 20.

Pepper. New York, 10; Philadelphia and Baltimore, in bags or bulk, 7 on aggregate; Cincinnati, 10; Charleston, in bags, 10.

amount to seven, ten, or other rate per cent. on the whole quantity of the article at risk, or on each box or bale, or each ten boxes or bales, in order of invoice,<sup>1</sup> and stipulations of this description are very frequently inserted, in filling the blanks of the printed form.

56. In the United States the *underwriters* are *exonerated from loss on goods by dampness*, change of flavor, or being spotted, discolored, or mouldy, unless caused by actual contact with seawater.<sup>2</sup>

Peas. Baltimore, in bulk, 100, in casks or bags, 10; Charleston Com. Ins. Co. 100.

Peltries. Baltimore, 20.

Pork. Lexington, 100.

Rice. Boston, Philadelphia, and Baltimore, 7; New York and Cincinnati, 10; Lexington, 100.

Rags. New York and Cincinnati, 100; Philadelphia, 100, or if by stranding, 20 on aggregate; Baltimore, 100; Charleston, 20 and 100.

Rope, bale. Charleston, 100; Cincinnati, 20.

Roots. Charleston Ins. Co. 100.

Salt. England, 100; Boston, 100, but if by stranding, 7 on aggregate; New York, Philadelphia, Baltimore, Cincinnati, Lexington, and Charleston, 100.

Seed. England, 100; Philadelphia, 100, or if by stranding, 20 on aggregate; Baltimore, 100; Cincinnati, 20.

Sugar. England, 5; Boston, 100, or if by stranding, 7 on aggregate; New York, 7; Philadelphia, 7 on aggregate; Baltimore, in boxes or casks, 7; Charleston, 7 and 10; Cincinnati, 10.

Steel. New York, Philadelphia, Baltimore, Charleston, 100.

Sumac. New York, Philadelphia, Baltimore, Charleston, 100.

Saltpetre. Philadelphia, 7 on aggregate; Charleston Com. Ins. Co. 10.

Straw Braid and Straw, Cut, 100.

Tobacco. England, 5; Boston, 7, on aggregate value; New York, 100; Philadelphia, leaf or stem, 15; Baltimore, in bulk, 100; leaf in bales, stems

in casks or bales, 20; leaf in casks, 10; Cincinnati, 20; Lexington, 100; Charleston, 100, leaf 7 and 10, or in bales 20, stems 20.

Tin Plates. New York, Philadelphia, and Baltimore, 100; Charleston, 100; or Charleston Com. Ins. Co., if by wet or rust, 100; Cincinnati, 20.

Twine. Charleston Ins. Co. 100.

Vegetables and Roots. New York, 100; Philadelphia, 100, or if by stranding, 20 on aggregate; Baltimore, vegetables and medicinal roots, 100; Charleston, 100.

Wicker Ware and Willow. New York, 100; Philadelphia, 100, or if by stranding, 20 on aggregate; Baltimore and Charleston, 100.

Wire. New York, Philadelphia, Baltimore, Charleston, 100.

All East and West India articles, Charleston Ins. Co. 10.

Articles of any kind by stranding or collision. Charleston Com. Ins. Co. 20.

Articles perishable in their own nature. Boston, 100, or if by stranding, 7 on aggregate value; New York, 100; Philadelphia, 100, or if by stranding, 20 on aggregate; Baltimore, Charleston, Lexington, 100; Cincinnati, 20.

All other articles, ship and freight. England, 3; Boston, New York, Philadelphia, Baltimore, Lexington, and Charleston, 5.

<sup>1</sup> Form of Atlantic Ins. Co. of New York for China risks.

<sup>2</sup> Boston, New York, Philadelphia, and Baltimore.

57. A loss is usually made *payable in sixty days after proof* of it, and of its amount, is exhibited to the insurers. The time and mode of payment of loss are subjects of specific stipulations.<sup>1</sup>

58. *Marine policies*, and also those upon inland trade, *provide for submitting disputes between the parties to arbitration.*<sup>2</sup>

<sup>1</sup> Commonwealth Ins. Co. v. Sennett, 37 Penn. Sts. 205.

<sup>2</sup> The provision for arbitration has little or no practical efficacy in marine insurance in Great Britain or the United States. 2 Story, Equit. Jurisprudence, §§ 1450, 1457; Kill v. Hollister, 1 Wils. 149; Thompson v. Charnock, 8 Term, 139. The assured may bring a suit for a loss without offering a reference. Robinson v. Georges, 17 Me. 131. The remedy at law for the breach of such a stipulation would be very precarious if it were brought into litigation, for it would be difficult for the jury to estimate the damage occasioned to a party by the other refusing to substitute an arbitration for the ordinary legal tribunals; and these tribunals, when resorted to by the assured, have declined to admit a plea to their jurisdiction, that a judicatory has been established by voluntary agreement of parties, to supersede those provided by law, in respect to future causes of action; though they lend their authority to the enforcement of an award once duly made by referees duly appointed. There does not appear to be any way of giving effect to such a stipulation, except through the agency of a judicial tribunal, which is almost equivalent to annulling the stipulation.

The French ordinance of Marine of 1861, tit. Insurance, a. 3, 2 Val. 143, requires that the policy shall contain the clause for submission to arbitration; but in another part, a. 70, implies that this is optional; and the French Code of Commerce, tit. X. Insurance, s. 1, n. 332, after enumerating this among the

provisions of the policy, leaves its insertion to the discretion of the parties. By the French law, as stated by Valin, where, in a dispute between copartners, or the parties to a policy of insurance containing this clause, either demands a submission to arbitrators, and the other refuses to name one, a judicial tribunal is authorized to name one for the party so refusing. Neither the English tribunals, nor our own, have any such authority, unless it is conferred by the agreement of parties in a case already pending. Pothier, Ins. n. 201, is of opinion that the tribunals applied to for the registration and execution of an award of unskilled arbitrators, in a case involving questions of law, should pay no regard to it, to which Emerigon replies, that, at Marseilles, such cases are submitted to advocates, and that the parties usually acquiesce in the award. So most cases of disagreement on policies, in England and the United States, are settled by reference voluntarily agreed upon by the parties after the questions arise. If I rightly understand Emerigon, a party has a right to negative the nomination made by the other, in which case the judge nominates the two arbitrators; and if so, the proceeding, so far as it is compulsory, is equivalent to a reference of a case, by one of our courts, to a master in chancery, or to auditors, subject to the supervision of the court. But what distinguished the proceeding from an arbitration, in our acceptance of the term, is, that an appeal lay from the award, as is stated by both Valin and Emerigon.

One ground of objection to setting

59. *Fishing voyages* have certain *peculiarities* requiring peculiar provisions, so that some companies have a distinct printed form of policy for them.<sup>1</sup>

The enumeration and descriptions of risks are the same; and so also all the provisions as to losses, that are applicable to such voyages, are expressed in the same words.

The principal differences are clauses providing that "catchings" shall take the place of "outfits," in a certain proportion, as the former are gained and the latter consumed in the course of the voyage;<sup>2</sup> and that "catchings" shipped homeward by other ships shall not diminish the amount at risk under the policy,<sup>3</sup> or that catchings shipped homeward by other vessels shall, in certain cases, diminish the amount at risk under the policy, where the assured can be presumed to have notice of their being so shipped, and so run the risk himself or get other insurance:

That, in case of the ship and all on board being lost, the value insured by the policy shall be presumed to have been at risk at the time of the loss:<sup>4</sup>

That the policy shall not attach on catchings until permanently stowed under deck,<sup>5</sup> or shall not attach on "blubber," nor on oil, until it is put into casks; nor on other articles of catchings until stowed below deck:

And that jettisons of catchings from on deck shall not be contributed for in general average.

Policies on whaling voyages are made by many offices on the blank forms used for common marine policies, with additional provisions to adapt the contract to fishing interests.

So policies on voyages for *cod*, *mackerel*, and *other fishing voyages*, and on those for taking seals, are usually made upon the common printed forms for marine policies.

60. The great *inland commerce* of the country gives occasion

up and enforcing an agreement for the submission of all future disputes between party and party to the final decision of arbitrators is, that associations might, on the same principle, be formed, with agreements to have all questions of the civil rights and obligations of the members among themselves settled independently of the public legal tribunals and the general laws, which would

be, thus far, an *imperium in imperio*. Some of the Charleston forms of policy, if not all, provide that the parties "may" submit disputes to arbitration.

<sup>1</sup> New York and New Bedford forms.

<sup>2</sup> New York and New Bedford forms.

<sup>3</sup> New York form.

<sup>4</sup> New Bedford form.

<sup>5</sup> New York form.



for a proportionate business of *insurance*, on risks differing very considerably from those of maritime navigation, and accordingly *demanding modified forms* of the contract of insurance. The forms of policies on this trade present the following among other provisions.<sup>1</sup>

The assured on the vessel is required to recover and repair it in case of accident, if practicable; and if he neglect to do so, is bound to give notice to the underwriters, if within a convenient distance, who have thereupon a right to repair at their own expense, and that of the assured proportionally.

The assured is not to make abandonment or sale of the vessel on account of damage or disaster without the consent of the insurers,<sup>2</sup> or notice to them, if within a certain distance.<sup>3</sup>

The insurers are not liable for wages and provisions of the master and crew while detained by disaster, but only for their extra services.<sup>4</sup>

In some forms<sup>5</sup> two and a half per cent. is deducted on payment of a loss.

The seasons of the year are specified when the vessel may make passages in certain waters, and when in others, and when it is to be laid up for the winter.<sup>6</sup>

It is also specified whether the insurers take the risk of fire, flood, and ice, when the vessel is laid up during the winter.<sup>7</sup>

The specification of the risks, for the lakes and rivers, in some forms, includes "perils of the seas, rivers, lakes, fires, jettisons, enemies, pirates, assailing thieves, and all other perils;" in others, where the navigation does not communicate with the ocean, the

<sup>1</sup> These provisions are taken from policies of the St. Louis companies, as stated in the St. Louis Insurance Reporter, No. 3, for March, 1851; that of the Delaware Mutual Safety Company, of Philadelphia; and those of the Columbus, the Mutual, and the Northwestern Insurance Companies, which do business at Buffalo, the last being established at Oswego; also those of Cincinnati and Lexington. The forms of contract used in these places will probably represent those generally adopted on the Mississippi, the lakes, and other western waters. The provisions

mentioned in the text do not belong to all the forms in use in those three places. There is some difference in the forms of the same place. Distinct forms are also used on different kinds of craft, as a steamboat or sailing vessel; or on different navigations, as on a canal, or river, or lake.

<sup>2</sup> Buffalo.

<sup>3</sup> Philadelphia.

<sup>4</sup> St. Louis.

<sup>5</sup> Ibid.

<sup>6</sup> Buffalo.

<sup>7</sup> Ibid.



specification is of "perils of the lakes, rivers, canals, fires, jettisons and damage to the vessel."

The risk of liability for damage done to other vessels by the one insured is sometimes expressly excepted.

The risk of damage by the bursting of boilers or collapse of flues, of breaking of the machinery of steamboats, except from unavoidable external cause, is also excepted.<sup>1</sup>

So also damage by overloading:

By having on board gunpowder:<sup>2</sup>

Innavigability from rottenness:

Risk of illicit or contraband trade: and

Risk from war.<sup>3</sup>

The right of abandonment for total loss is restricted to cases where the recovery or reparation of the vessel is impracticable.

It is stipulated, that exertions to save the property shall not be a waiver or acceptance of an abandonment, as in marine policies:

That the subject insured and the salvage abandoned shall be free from lien and incumbrance:

That on change of master the insurers may terminate the policy:<sup>4</sup>

That the assured shall not abandon cargo for the amount of damage or expense merely, unless he would be liable to the amount of fifty per cent. in an adjustment as a partial loss, as in some forms of marine policies:

That in adjusting a loss on a vessel, reference shall be had to its value at the time of the loss, unless it is valued in the policy:

That detention by the season of the year shall not authorize abandonment:

That delay on account of low water shall not prejudice the insurance:

That abandonment shall be made in writing:

That in cases of loss, the premium-note; or that and all other demands of the insurer, shall be deducted:

<sup>1</sup> Some insurers take the risk of fire in such case. The Delaware Mutual Safety Co., of Philadelphia, lets in all damage by these causes, in case of stranding.

<sup>2</sup> Cincinnati, Philadelphia.

<sup>3</sup> Delaware Mutual Safety and Philadelphia; the same form includes risk of enemies.

<sup>4</sup> Lexington, Philadelphia.

That the contract shall be void if hemp is carried on deck ; and in case of over insurance,\* or of assignment of the policy, or of the subject, without the consent of the insurers :

That the adjustment of losses shall be subject to certain usages :<sup>1</sup>

That on return of premium, ten per cent. of its amount shall be retained.

61. *A distinct form of policy* is sometimes used *for insurance on canals.*<sup>2</sup>

The usual description of cargoes, in a policy kept open for new subscriptions, is "all kinds of goods, merchandise, and country produce." "Money, bullion, promissory notes, and other evidence of debt," are excepted.

In the blanks of the printed forms are inserted a description of the boat or boats, the limits of the navigation, and the period of time, or the passage for which the insurance is made.

The boats may be loaded in the customary way :

May touch and stay at the usual places ; or for discharging and taking in cargo ; or when necessary on account of an accident or stress of weather.

The perils insured against are, of the "rivers, canals, and fires ;" excepting "thefts, robbery, ice, and barratry ;" and losses from "want of ordinary care and skill," or from "the boat being unduly laden."<sup>3</sup>

Any loss must be ascertained before reshipping the goods at the port where they are landed.

The provisions for recovering and saving the property ; payment of loss in sixty days after proof ; deducting the premium in case of loss ; respecting prior, subsequent, and over insurance ; illicit trade ; innavigability from rottenness ; assignment of claims (in case of loss) against third parties by whom the loss was occasioned ; the assignment of the policy without the consent of the insurers ; the settling of averages on each passage separately ; and settlement by arbitration, are the same as those already

<sup>1</sup> Those of New York are referred to in a Buffalo form.

<sup>2</sup> The provisions mentioned in the text, under this head, are taken mostly from forms used in Buffalo, in the trade between that place and Albany. Some are from a Philadelphia form used for

inland navigation, but which differs much less from the common marine policies.

<sup>3</sup> Buffalo form. The perils enumerated in the Philadelphia form for inland navigation, are the common perils of marine policies.

stated in maritime insurance, or that on the lakes and the Mississippi.

No loss is payable that does not amount to one hundred dollars on one cargo.

Notice of loss is to be forthwith given to the insurers.

It is expressly provided that the boat shall be kept tight, and well found and manned.

Lights must be shown when the boat is moored at night,<sup>1</sup> or anchored or under way.<sup>2</sup>

Goods carried on deck must be secured thereto.

The form of policy used in this trade, like one already mentioned for marine risks, is so framed as to admit of adding new subjects by merely indorsing the date, amount, subject, name of boat, passage or period, and premium.

62. *A distinct form of policy is used for insurance of the cargoes of flat-boats on the rivers.*

A Cincinnati form of that description provides, —

That the risk may continue five days after arrival :

That the risks are those of “the rivers, fire, and jettison :”

That the boat may touch and stay during the night :

That the insurers shall not be answerable for the conduct of the master or pilot ;

Or for damage by ordinary stranding ;

Or for damage to articles subject to inspection, if the same pass inspection as sound ;

Or for damage to any article, except by fire or actual contact with water ;

Or for damage by goods being damp, spotted, discolored, mouldy, or rusty, unless caused by some disaster to the boat ; or in any case for merely soiled or stained packages :

That damaged goods shall not be sold at any place except that of destination, unless in a perishing condition :

And that the boat shall be properly manned, and be laden only to a specified depth.

#### SECTION VI. THE PROVISIONS OF A FIRE POLICY.

63. *The general principles applicable to policies against fire on land, coincide with those applicable to marine insurance ; but*

<sup>1</sup> Buffalo form.

<sup>2</sup> Philadelphia form.

the specific provisions of the contracts in the two kinds of insurance differ very much. In some fire, as in most marine policies, the whole written contract appears in the instrument subscribed by the insurers; but most of the former refer to rules and regulations, conditions, and requirements, indorsed upon, or otherwise annexed to the inscribed instrument, and referred to in it, and so the mutual stipulations become more fully a part of the express contract; being thus indorsed or annexed, because, in case of the conditions and requirements being quite various and numerous, as they are in many of the forms of fire policy, they can, in this manner, be more conveniently and intelligibly expressed.

Some of the forms in use by stock companies have no such indorsements and references, and their forms are not found to be attended by any inconvenience on that account; but the policies of mutual companies usually consist in part of indorsed or annexed instructions and conditions, and this form is preferable for such associations, since the stipulations referred to are usually the provisions of the charters of the company, or its rules and regulations.

Fire policies generally include the following particulars,<sup>1</sup> namely;

*Names of the parties:*

*Amount insured:*

*The premium:*

*Period of the risk,* for a specified time from twelve o'clock, at noon, on a certain day, like marine policies on time:

*Description of the subject,* as a building, situated in such a place; built of such and such materials; of a specified value; how occupied; how near to other buildings, or what others are within a specified distance, and what kind of buildings, and how occupied:

If on goods, what kind; in what buildings kept, with a description of the building and situation, as in case of a policy upon the latter:

*The interest of the assured* in the subject, if he be not absolute owner, as that of lessee, depositary, trustee, agent entitled to a commission, or insuring for his own benefit or that of his princi-

<sup>1</sup> Taken from forms in Boston, Hartford, New York, Philadelphia, Baltimore, and Charleston.



pal, or for both. The rule of some companies, as expressed in the indorsed instructions and provisions, is, that any such qualified interest may be covered, as in a marine policy, by the phrase "for whom it may concern."<sup>1</sup>

*Certain articles*, as books of account, written securities, deeds, or other evidences of title to lands, bonds, bills, notes, and other evidences of debt, and money or bullion, *are excepted* from the insurance.

*Others*, such as jewelry, precious stones, watches, plate, medical, musical, and scientific instruments, medals, and other curiosities, paintings, prints, engravings, statuary, and sculpture, are usually *not included, unless distinctly specified*.

*Valuation is made of articles of precarious value :*

If no valuation, the amount of loss to be determined by the value at the time of the loss :

*Exception of loss by lightning*, explosion of steam or gunpowder, or other *explosive substances*, unless the article insured is burnt :

*Exception of loss by fire* occasioned by *invasion, insurrection, riot, civil commotion, or military or usurped power :*

Condition that the *insurance is void if prior insurance is not indorsed ; or subsequent*, forthwith, or as soon as may be, or within a certain time, after being made.

*Or if any trade* classed as *hazardous* in the memorandum annexed to the policy, shall be *carried on in the premises* insured, or where the goods insured are stored :

*Or if the subject or policy shall be assigned* without the consent of the insurers ;

*Or if the risk shall be increased by alterations* or otherwise by *the assured ;*

*Or in case of fraud* or false swearing on the part of the assured.

It is provided in some policies that, where there is other insurance, *all the insurers are to pay only pro rata* for a loss :

*That the policy may be continued by indorsements* to that effect :<sup>2</sup>

*That the insurers may cancel the policy, if others, by erecting buildings or otherwise, enhance the risk :*<sup>3</sup>

<sup>1</sup> Delaware Mutual, Philadelphia.

<sup>2</sup> Blank forms for continuance of the policies are indorsed, to be filled up from time to time, in some forms of fire policies, as in some marine policies.

<sup>3</sup> Some forms provide that such enhancement shall be at the risk of the insurers, and not give them any right to cancel the policy.

*That the policy is not binding until the premium is paid :*

*That the assured shall, in case of fire, use his utmost endeavors to save the property :*

*That on a loss occurring, the assured shall forthwith give notice to the insurers, make out an account, under oath, of the articles lost ; produce a certificate of some magistrate that he believes the assured to have sustained the loss and acted honestly ; and shall produce books, bills, and schedules relative to the description, quantity, and value of the property lost or damaged :*

*That the insurers may replace articles lost or damaged, by others equivalent :*

*That a loss shall be payable in sixty days after notice and proof :*

*That any dispute about the amount of loss shall be settled by appraisers.*

*That an action on the policy shall be brought within a certain time or in certain courts.*

#### SECTION VII. THE PROVISIONS OF A LIFE POLICY.

64. The provisions of life policies are much fewer, and the forms of policy more simple and of less variety, than those of commercial and fire insurance.

A life policy usually contains the following particulars, namely :

*Names of the parties*, and for whose benefit the policy is made, if not for that of the party procuring the insurance :

*The name of the life* insured, whether the assured himself, or his debtor, or other person in whose life he is interested :

*The premium*, usually annual, sometimes a single premium for the whole period of the insurance :

*The amount* insured.

*The period*, whether for life or a term of years :

*The time for payment* of a loss, usually, as in other insurance, in sixty days after notice and proof of the loss :

*The condition that the policy shall be void and forfeited ;*

*In case the person whose life is insured shall die at sea*, some printed forms giving liberty of certain coasting or other passages :

*Or pass beyond certain latitudes and longitudes, or certain territorial boundaries ;*

*Or if the life shall be beyond a specified limit during certain seasons ;*

*Or if he shall enter into the naval service, or the military, otherwise than that of the militia ;*

*Or die by his own hands, or by the hands of justice, or in a duel, or in consequence of a violation of law ;*

*Or if any of the statements made by the applicant at the time of procuring the policy, and as the basis of the contract, are untrue ;*

*Or if the premium shall not be paid at the time specified.*

It is usually stipulated that *in case of forfeiture* of the policy, *the premiums* previously paid shall be *forfeited* ;

And in some policies, that *notice* of any assignment of the policy shall be given to the underwriters.

Various *liberties* are inserted in these policies, according to the particular circumstances, such as to travel or reside beyond the ordinary limits ; follow the sea ; or enter into the military or naval service ; or pursue any employment prohibited by the ordinary provisions of the policy.

#### SECTION VIII. WHAT IS COMPREHENDED BY THE POLICY AS BEING A PART OF IT.

65. *The principles whereby it is determined what constitutes a part of the contract, are the same in commercial, fire, and life insurance.*

66. *The correspondence of the parties, or communications between them, previously to executing the policy, do not constitute a part of the contract, to the same effect as if inserted, unless incorporated by a reference.*

Where the agent of the owner of the insured property left a memorandum at the office, signed by himself, "that the policy was to take effect, if no insurance should be made by the owner elsewhere," which was shown to the underwriters at the time of signing, and the owner did in fact make insurance abroad, though not to the full value of the property ; yet this memorandum was held not to be any part of the contract, and could not be taken advantage of by the underwriters to avoid payment of a loss. Chief Justice Parker, giving the opinion of the court, said, that "Policies, though not under seal, have nevertheless ever been deemed instruments of a solemn nature, and subject to most of the rules of evidence which govern in the case of specialties. The

policy itself is considered to be the contract between the parties, and whatever proposals are made, or conversations had, prior to the subscription, they are to be considered as waived, if not inserted in the policy or contained in a memorandum annexed to it." <sup>1</sup>

And a correspondence concerning an insurance previously to making it, in which the voyage is described, will not control the construction of the policy; <sup>2</sup> nor will a paper that was shown to the underwriters at the time of signing, in which the number of men and guns on board was stated, <sup>3</sup> or one in which it was stated that the vessel had deviated from the voyage described in the policy before the insurance was effected; <sup>4</sup> nor are words spoken by the parties at the time of signing the policy of the same effect as if they had been inserted in the policy; as where the underwriter at the time of signing, said he would not be held if the vessel did not sail by a certain day, <sup>5</sup> and where a broker told the underwriters that the goods were not on board of a certain ship, <sup>6</sup> and where the assured said the ship was American. <sup>7</sup>

Nor is evidence admissible to prove that, where, according to the construction put upon a policy on goods from L. to O. it covered goods on only one trip of a steamboat, the president of the insurance company orally agreed that the insurance should be applied to shipments on two successive trips. <sup>8</sup>

"No instance can be found," says Parker, C. J., "where the knowledge of the underwriter that a deviation was intended, has been set up as an excuse for such deviation." <sup>9</sup>

Proof of a statement by the assured, that the goods at risk were memorandum articles, as a reason for a lower premium, was held

<sup>1</sup> *Higginson v. Dall*, 13 Mass. 96. And see 1 Greenleaf, Ev. c. 15, § 275, &c., p. 315, &c., ed. 1842. *Philbrook v. New England Ins. Co.* 37 Me. 137; *Howard Ins. Co. v. Bruner*, 23 Penn. St. 50.

<sup>2</sup> *Vandervoote v. Smith*, 2 Caines, N. Y. 155; *Stevens v. Beverly Ins. Co.* S. J. C. Mass., Essex, Nov. 1822. It is, however, said, in one case, that the written order for insurance will control the policy. *Norris v. Ins. Co. of N. A.* 3 Yeates, Penn. 84, for which 1 Atk. 547, is cited.

<sup>3</sup> *Pawson v. Barnevelt*, Dougl. 12, n.

<sup>4</sup> *Redman v. Sowdon*, 5 Taunt. 462;

<sup>1</sup> *Marsh.* 136; 3 Campb. 503.

<sup>5</sup> *Whitney et al. v. Haven*, 13 Mass. 172.

<sup>6</sup> *Weston v. Emes*, 1 Taunt. 115.

<sup>7</sup> *Atherton v. Brown*, 14 Mass. 152.

<sup>8</sup> *Courtney v. Miss. Fire and Mar. Ins. Co.* 12 La. 233.

<sup>9</sup> *Wiggin et al. v. Boardman*, 14 Mass.

15. See also *Weston v. Emes*, 1 Taunt. 115.



in New York not to be admissible, on the part of the underwriter, to show that they were to be brought under the memorandum, this being a mere opinion on the construction of the terms of the policy designating those articles, the meaning of which terms must be regulated by the usage.<sup>1</sup>

Evidence of an oral promise by the assured in a fire policy, that he would substitute a stove for an open fire-place if the insurance should be made, was held in New York to be inadmissible, on the ground that its admission would be introducing a new distinct stipulation into the policy; and that it could not avail as a representation, because it was not the statement of a fact.<sup>2</sup> This reason is, however, not good.<sup>3</sup>

But where the assured in a fire policy, in his application for insurance, stated the mode of conducting business and precautions taken to guard against fire in the building to which the policy related, it was held in Massachusetts that he was bound to a substantial compliance with the statement, whereby it was, in effect, construed to be an implied condition, or promise, relative to the risk during its continuance.<sup>4</sup>

*The subsequent oral admissions of one party are not permitted to be proved by the other to contradict the written contract,*<sup>5</sup> since this would give them the same effect as if inserted in it.

But though the proposal or order for insurance, or a paper shown or words spoken at the time of signing, are not a part of the contract, to the same effect as if the words spoken or contained in the proposal or paper shown, had been inserted in the policy, still the contract may be affected by them, if they are such

<sup>1</sup> *Astor v. Union Ins. Co.* 7 Cow. N. Y. 202. Accordingly, the position reported to have been taken by the English Court of Common Pleas in one case, *Urquhart v. Barnard*, 4 Taunt. 450, that written notice of an intention to take in cargo at a port named is equivalent to a custom so to do, cannot be supported; though such a notice might be a ground for application to a court of equity to reform the policy, if the liberty to take in goods were omitted inadvertently and through mistake. The case was rightly decided, as it appeared that no delay was occasioned,

and the risks insured against were not enhanced by taking in cargo, but the decision was put upon a wrong ground.

<sup>2</sup> *Alston v. The Mechanics' Mutual Ins. Co.* 4 Hill, N. Y. 329.

<sup>3</sup> See *infra*, No. 533.

<sup>4</sup> *Houghton v. Manuf. Mutual Fire Ins. Co.* 8 Metc. Mass. 114.

<sup>5</sup> *Paine v. M'Intier*, 1 Mass. Rep. 69. A similar admission was, however, allowed to be proved on a question as to the amount of damage for breach of a written contract. *Leland v. Stone*, 10 Mass. 459; *Townsend v. Weld*, 8 Mass. 146.

as to induce the underwriter to take the risk, as will be seen under the head of representation.<sup>1</sup>

67. The *stipulations implied* by the language of the policy of insurance are as much a *part of the instrument* as any of its express provisions, and, therefore, cannot be countervailed by proof of oral agreements, understandings, notices, or representations between the parties, since this would be adding to or abstracting from the written contract.<sup>2</sup>

68. *What is contained in the policy, or other instrument, or written upon it*, purporting to belong to it, at the time of signing, is a *part of the contract*, and is adopted by the signature; whether the words are in the margin,<sup>3</sup> or written transversely,<sup>4</sup> or indorsed.<sup>5</sup>

69. *A provision inserted in the policy*, with consent, *after it is subscribed*, is part of it.<sup>6</sup>

70. *A policy*, as well as other instruments, *may refer to records, or other papers, so as to make them a part of the written contract*.

Where, in a policy under seal against fire, the insurers agreed to pay the loss, "according to the tenor of their printed proposals,"

<sup>1</sup> It is held in New York that a prospectus of a life insurance company not referred to in the policy is not a representation binding on them under any circumstances [Comstock, Davis, Mason dis.]. *Reeve v. Mutual Ins. Co.* 23 N. Y. 516; see also *Wood v. Dwaris*, 11 Exch. 493; 33 Eng. L. & Eq. 514.

<sup>2</sup> *Creery v. Holley*, 14 Wend. N. Y. 25. See 1 Greenleaf, Ev. § 275; 2 id. § 377, who cites *Smith v. Wilson*, 3 Barnew. & Ad. 728; *Hockin v. Cooke*, 4 Term, 314; *Attorney-General v. The Cast Plate Glass Co.* 2 Anstr. 39; *Sleght v. Rhineland*, 1 Johns. N. Y. 531; *Frith v. Barker*, 2 Johns. N. Y. 327; *Stoever v. Whitman*, 6 Binn. Penn. 417; *Henry v. Risk*, 1 Dall. Penn. 265; *Doe v. Lea*, 11 East, 312. Whatever is fairly implied by the language of the policy is part of it. Per *Bronson, J.*, *Potter v. Ont. & Liv. Mut. Ins. Co.* 5 Hill, N. Y. 147.

<sup>3</sup> *Cockran v. Retberg et al.* 3 Esp. 121; *De Hahn v. Hartley*, 1 Term,

343; *Guerlain v. Col. Ins. Co.* 7 Johns. N. Y. 527, but the margin is referred to in the policy; *Bean v. Stupart*. Dougl. 11; *Ewer v. Washington Ins. Co.* 16 Pick. Mass. 502.

<sup>4</sup> *Kenyon et al. v. Berthon*, Dougl. 12, n.

<sup>5</sup> Mod. Cas. 237, cited *Jacob. L. Dic. tit. Deed*, III.; *Harris v. Eagle F. Ins. Co.* 5 Johns. N. Y. 368, though the words and figures indorsed are referred to in the policy in this case; *Warwick v. Scott*, 4 Campb. 62, where the regulations of the insurance company, and the conditions on which they insured, were indorsed. And see *Stocking v. Fairchild*, 5 Pick. Mass. 181; *Gould v. Gould*, 4 N. H. 173. The terms and conditions of fire policies are usually indorsed and referred to in the policy. *Duncan v. The Sun Fire Ins. Co.* 6 Wend. N. Y. 488; *Hygum v. Ætna Ins. Co.* 11 Iowa, 21.

<sup>6</sup> *Jenks v. Hallet*, 1 Caines, N. Y. 60.

and it was objected that a distinct paper could not be thus incorporated into a sealed instrument, the court held that it might be so, and that it was too clear to admit of a doubt.<sup>1</sup>

A written representation or document may be referred to in the policy to the same effect as if inserted in the body of it, and thus be made a part of it, and accordingly become a warranty of the facts stated in it, or other stipulation or condition equally obligatory with the policy itself. The rules and regulations of an insurance company are frequently so referred to in marine and fire policies, more especially those of mutual insurance companies.<sup>2</sup> The effect of such reference must, however, depend on the manner and object of making it.<sup>3</sup>

*71. A paper annexed to the policy at the time of its delivery, and purporting to belong to it, is part of it, if so intended, though not expressly referred to in it.*<sup>4</sup>

But in case of a document delivered with the policy, and not

<sup>1</sup> *Routledge v. Burrell et al.* 1 H. Bl. 254; and see *Oldman v. Bewicke*, 2 H. Bl. 577, n.; *Wood et al. v. Worsley*, 2 H. Bl. 574; *Worsley v. Wood*, 6 Term, 710; *Tarleton et al. v. Staniforth et al.* 5 Term, 695; S. C. 1 Bos. & P. 471; 3 Anstr. 707.

<sup>2</sup> *Clark v. Manufacturers' Ins. Co.* 8 How. 235, where the representations referred to in a fire policy were those of a previous assured; *Jennings v. Chen. Mut. Ins. Co.* 2 Den. N. Y. 75; *Burritt v. Saratoga Mut. Fire Ins. Co.* 5 Hill, N. Y. 188, where the reference was for a description of the property insured; and *Kentucky and Louisville Ins. Co. v. Southard*, 8 B. Monr. Ky. 636, also a reference for description; *Trench v. Chenango Mut. Ins. Co.* 7 Hill, N. Y. 122, reference to the statement of the distance of the insured building from others; and see *Maryland Ins. Co. v. Bossiere*, 9 Gill & J., Md. 121; *Stewart v. Wilson*, 12 Mees. & W. Exch. 11, a case of reference to a rule of a mutual marine company, making a condition for repairs and outfits to be ordered by a committee. See also *Ken-*

*nedy v. St. Lawrence County Mut. Ins. Co.* 10 Barb. N. Y. 285; *Sillem v. Thornton*, 3 Ell. & B. 868; 26 Eng. L. & Eq. 238; *Sheldon v. Hartford Ins. Co.* 22 Conn. 235; *Draper v. Charter Oak Ins. Co.* 2 All. Mass. 569; *Fabyan v. Union M. F. Ins. Co.* 33 N. H. 203. But the by-laws of a company do not form part of the policy, unless referred to. *Kingsley v. New England Ins. Co.* 8 Cush. Mass. 393. See *Barre Boot Co. v. Milford Ins. Co.* 7 All. Mass. 42, on the point that a condition that the application is true is an express condition, but does not make the application a part of the contract.

<sup>3</sup> *Burritt v. Saratoga Mutual Fire Ins. Co.* 5 Hill, N. Y. 188; and see *Maryland Ins. Co. v. Bossiere*, 9 Gill & J. Md. 121.

<sup>4</sup> *Murdock v. Chenango Mutual Ins. Co.* 2 N. Y. 210; a condition was subjoined on the same sheet. See also *Roberts v. Chenango Mut. Fire Ins. Co.* 3 Hill, N. Y. 501; *New York Ins. Co. v. National Ins. Co.* 20 Barb. N. Y. 468; *Desilver v. State Ins. Co.* 38 Penn. St. 130.



referred to in it, though it is presumed to be part of the policy if it so purports, yet this presumption may be rebutted by evidence that it was so delivered by mistake.<sup>1</sup>

72. *Where a document referred to in a policy for a description of the subject, states facts not material to the risk, the reference does not amount to a warranty of such facts;* as where the policy was on premises described in it and said in the policy to be "more particularly described in the application and survey furnished by the assured, No. 938, in the office of the underwriters," it was held by the Supreme Court and Court of Errors of New York, not to be a warranty that all the facts stated in the application and survey, material or not material to the risk, were strictly and literally as stated, but that it was enough, if they were substantially correct, that is, correct so far as they were material to the risk. Therefore, though the survey stated that a partition extended up to the roof, which did not, in fact, extend so high, yet, as the jury found the variance not material, it was held that the policy was not thereby defeated.<sup>2</sup>

The written proposals for previous policies on the same subject were referred to, "loss to be paid to C. as described in report No. 193." Some immaterial alteration had been made in the mean time, so that the building did not precisely conform to the report: Held not to affect the validity of the policy.<sup>3</sup>

Insurance against fire was made on three tenements in Mobile, "per report No. 36,748, filed in the Washington office." When application for insurance was made at the Washington office, the assured had given a plan of the buildings insured, and the adjoining buildings and ground. The buildings occupied a corner of a square, and the ground in the rear of them was represented as being vacant. It does not appear that this plan was included in, or how particularly it was connected with, the report referred to. The insurers contended, that this plan was by such reference made a part of the policy, and constituted a warranty that the adjoining ground was vacant at the time of making the insurance,

<sup>1</sup> *Roberts v. Chenango Mut. Fire Ins. Co.* 3 Hill, N. Y. 501. N. Y. 481; *Boardman v. New Hampshire Ins. Co.* 20 N. H. 551.

<sup>2</sup> *Snyder v. Farmers' Ins. & Loan Ins. Co.* 13 Wend. N. Y. 92; *Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. N. Y. 72. <sup>3</sup> *Jefferson Ins. Co. v. Cotheal*, 7 Wend. N. Y. 72.



and should continue to be so during the risk. But it was held not to be such a warranty.<sup>1</sup>

Where two policies were made on interest in freight at the same office, one by the owner, the other by the charterer, reference to one was allowed by the court to explain the other;<sup>2</sup> though no such reference was made in the policies to be explained.

73. *Verbal declarations even may, by a provision in the policy, be made to form, directly, a part of the contract*; as where the policy is on goods, "thereafter to be declared," the subsequent declaration of the assured, though not made in writing, will determine the subject to which the policy is to attach. And the assured, having made a declaration, by mistake, that the goods were on board of a certain ship, on board of which he had no goods, was permitted to make a second declaration. Lord Ellenborough said, it was a "corrigible mistake," and that "the first declaration did not form any part of the contract."<sup>3</sup> This is a special exception to the general rule already laid down; or rather it is a written agreement to abrogate that rule in the particular case.

#### SECTION IX. RENEWAL OF THE CONTRACT.

74. *Policies, whether commercial or against fire or on a life, sometimes contain a provision for renewal or continuance*, by the payment of the premium within a certain time,<sup>4</sup> or on some other condition.

It was agreed in a life policy by a society for mutual insurance, that, if the assured should pay, or cause to be paid, the premium on certain days quarterly during his life, "or within such time after those days respectively as was or should be allowed for that purpose by the rules of the society; and if he would pay

<sup>1</sup> *Stebbins v. Globe Ins. Co.* 2 Hall, N. Y. 632.

<sup>2</sup> *Etches v. Aldan*, 1 Mann. & R. 157. So in the case of two policies between the same parties on a building and its contents. *Fogg v. Middlesex Ins. Co.* 10 Cush. Mass. 337; *contra*, *Fulton Ins. Co. v. Goodman*, 32 Ala. N. S. 108.

<sup>3</sup> *Robinson v. Touray*, 3 Campb. 158; 1 Maule & S. 217.

<sup>4</sup> *Tarleton v. Staniforth*, 5 Term, 695; S. C. 1 Bos. & P. 471; 3 Anstr. 707; *Franklin F. Ins. Co. v. Massey*, 33 Penn. St. 221.

his proportion of the moneys which the members should, during his life, be called on to contribute, according to the rules, towards making good any deficiency of the funds of the society to answer the claims upon it," then on his death the society should pay to his widow, in case she should survive him, a certain annuity.

By the rules of the society, if any "member" neglected to pay the quarterly premiums for fifteen days after the same became due, the policy was to be void, unless the "member" (continuing in as good health as when the policy expired) "should pay up, within six months then next, all arrears, together with five shillings for every month elapsed after such premium became due."

The quarterly premiums were regularly paid previously to the one becoming due on the 20th of December, 1808. The assured died on the 25th of December, without having paid or tendered the premium. On the 27th of the same December, the quarterly premium was tendered to the society by his executors.

Lord Ellenborough and his associate judges held, that the privilege of paying the premium within fifteen days from the end of a preceding quarter belonged exclusively to the assured himself, who was a member of the society, and not to his widow or representatives, and, in support of this position, referred to the provision for an assessment, saying, if the policy could be kept alive by the survivors, then this provision would be in effect cancelled, as there would be a subsisting policy on which an assessment could be made. The judgment was accordingly against the claimants.<sup>1</sup>

By a policy of a mutual company against fire, it was stipulated, that the assured should pay the premium for a certain time, "and should, as long as the managers should agree to accept the same, make payments annually, within fifteen days after the time limited by the policy, upon forfeiture thereof, and that no insurance should take place until the premium should be paid." The policy was for six months, and expired before the premises were consumed by fire. The assured tendered the premium after the fire, within fifteen days, which the society refused to accept. Lord Kenyon, C. J.: "It was admitted by the plaintiff, that the insurance, when made, did not extend to a half-year and fifteen days. If, when the first premium was paid,

<sup>1</sup> *Want v. Blunt*, 12 East, 183.

the insurance did not extend to fifteen days beyond this half-year, the continuation of the term depends on two circumstances, that the assured should pay the premium and the insurers agree to accept it." Ashhurst, J.: "The assured are at their own risk during this interval;" if any accident happen before the premium is paid, they stand uninsured.<sup>1</sup>

Under a policy containing the same provision, the insurance company gave notice, that they would not continue it without an increase of premium, to which the assured replied, that they would not give any additional premium. Within the fifteen days, the insured building was burnt down, and the assured tendered the premium which had been demanded, which the company refused to accept. Lord Ellenborough and his associates held, that if the assured had, by the terms of the contract, the right to continue the insurance by payment of the premium within the fifteen days, their tender would have entitled them to recover the loss. But as the underwriters had the right to terminate it at the end of the specified term, and had elected so to do, unless the assured should agree to pay a higher premium, which they declined to do, the insurance was terminated at the end of that term.<sup>2</sup>

75. *If the policy contains no provision for renewal by some act of the assured, it requires a written agreement of the underwriter to renew it after its termination,*<sup>3</sup> except in case of termination by forfeiture of a condition within the stipulated period of the risk, in which case it may be continued in force by some transaction between the parties, amounting to a waiver of the forfeiture on the part of the underwriters.

A policy for \$1800 on a building and \$700 on machinery, being continued for \$2500 on the building and machinery without any apportionment of the amount, was held, in New York, to be applicable to the two subjects indiscriminately.<sup>4</sup>

<sup>1</sup> Tarleton et al. v. Staniforth et al. 5 Term, 695; S. C. 1 Bos. & P. 471; Anstr. 707. In consequence of this decision, sundry offices gave public notice, that persons insured by policies taken out for one year or longer were considered as insured for fifteen days beyond the time of the expiration of their policies. Hughes, 508.

<sup>2</sup> Salvin et al. v. James & Langston, 6 East, 571.

<sup>3</sup> Cockerell v. Cincinnati Ins. Co. 16 Ohio, 149.

<sup>4</sup> Driggs v. Albany Ins. Co. 10 Barb. N.Y. 440. See also, Honnick v. Phoenix Ins. Co. 22 Mo. 82; Peacock v. N. Y. &c. Ins. Co. 20 N. Y. 293; Liddle v. Market, &c. Ins. Co. 4 Bosw. N. Y.

## SECTION X. ASSIGNMENT OF THE POLICY.

76. *Policies* of insurance in their usual form, whether marine, fire, or life, *are not negotiable* nor subject to be assigned, without the consent of the insurers, so as to give the assignee a right to prosecute claims upon them, in his own name, as he may on an assigned bill of lading.<sup>1</sup>

M. Alauzet<sup>2</sup> says, that under the French law nothing prevents a marine policy being made payable to order or bearer. And Mr. Duer<sup>3</sup> is of opinion, that a marine policy would be transferable so as to authorize a demand, and suit upon it, in the name of the assignee of both the policy and its subject, without the consent of the insurer. A marine policy "for account of whom it may concern at time of loss," is an instance of an insurance, transferable with, and as incidental to, the subject, according to the terms of the policy itself. And Chancellor Walworth, of New York, held the insurers on a steamboat to be answerable in equity according to the purport of the policy, saying at the same time, that he did not intend to give any opinion respecting a suit at law.<sup>4</sup> Mr. Duer<sup>5</sup> considers the contract, being a marine one, and coming within the law merchant, not to be subject to the common-law rule respecting the assignment of choses in action.

A marine policy of insurance on goods seems to be precisely similar to a bill of lading as to its assignableness, provided it imports on its face a responsibility directly to the assignee of the goods, and I accordingly venture to state it as the better doctrine, that *the interest in a marine policy purporting on its face to insure the owner of the goods, whoever he may be, is assignable with the goods, to the effect of giving the assignee a right to make demands and bring suits upon it in his own name. And the same doctrine is, I think, applicable to a similar policy upon a vessel, or one*

179. A renewal is a new contract and governed by the laws in force at the time of renewal; *Brady v. North-western Ins. Co.* 11 Mich. 425.

<sup>1</sup> *Carroll v. Boston Mar. Ins. Co.* 8 Mass. 515; *Loring v. Manuf. &c. Ins. Co.* 8 Gray, Mass. 28. It is held in Maryland that a life policy being a chose in action is assignable by Stat.

1829, c. 51. *New York L. Ins. Co. v. Flack*, 3 Md. 341.

<sup>2</sup> Vol. I. p. 360, § 192.

<sup>3</sup> *Marine Insurance*, Vol. II. pp. 51, 52, §§ 9, 32.

<sup>4</sup> *Rogers v. Traders' Ins. Co. and same plaintiff v. The Howard Ins. Co.* 6 Paige Ch. N. Y. 583.

<sup>5</sup> *Marine Insurance*, Vol. II. p. 51, n.



against fire upon land, for though the personal confidence of the underwriter in the assured is greater in such a policy than in one on a cargo, still I am not aware of any principle of law inconsistent with his using his own discretion in this case, so far as to make his contract pass with the subject.<sup>1</sup>

77. *Where the insured interest is assignable, whether in a marine, fire, or life insurance, the policy is assignable in equity to the assignee to whom the subject-matter or interest thereby insured is assigned, provided it contains no provision to the contrary.*<sup>2</sup>

If a contract is mutually executory, or executory on one part, and imports personal confidence and trust, as in contracts for labor or professional service, a party by whom the service is to be performed, and in whom personally a trust is reposed respecting the manner of executing the contract, cannot, by an assignment, substitute another in his place, since he does not in this way furnish to the other party what was agreed for. The doctrine of the assignableness of policies, therefore, proceeds on the presumption that no personal confidence is reposed in the skill of the assured, in respect to the conducting of the voyage. But it does not follow that this presumption is conclusive. On the contrary, it is easy to imagine the stipulations of a policy to be such as to import the confidence of the underwriter in the assured personally; in which case the voluntary substitution of another, by the transfer of the interest, and the management and control of the subject, would be such a change of the risk as to discharge the underwriter.

78. The doctrine was early laid down by Lord Chancellor King, that a fire policy cannot be assigned pending the risk so as to give any interest in it whatever, legal or equitable, to the assignee.<sup>3</sup>

<sup>1</sup> In *Weston v. Penniman*, 1 Mas. C. C. 306, Judge Story decided that an assignee of a draft not negotiable, and accepted "to pay any one to whom it should be assigned," could sue in his own name.

<sup>2</sup> *Gourdon v. Ins. Co. of N. America*, 3 Yeates, Penn. 327; S. C. 1 Binn. Penn. 430; *Rousset v. Ins. Co. of N. America*, 1 Binn. Penn. 429; S. C.

*Condy's March*, 287, n.; *Delany v. Stodart*, 1 Term, 22; *Marshall Ins.* 800; *Ashley v. Ashley*, 3 Sim. Ch. 151; *Wakefield v. Martin*, 3 Mass. 558; *De Ghetoft v. London Ass. Co.* Mosel. 83, and see 1 Atk. 547; *Earle v. Shaw*, 1 Johns. Cas. N. Y. 313.

<sup>3</sup> *Lynch v. Dalzell*, 4 Brown Parl. Cas. 431, Toml. ed.

And the same doctrine is countenanced, though not directly declared, by Lord Chancellor Hardwicke.<sup>1</sup> But Mr. Ellis<sup>2</sup> implies that *a fire policy, containing no provision or implication to the contrary, is assignable in equity with the subject itself*, on notice being given to the insurers.<sup>3</sup>

78 a. *An insurance company cannot, by reinsurance, turn an assured over to the reinsurers without his consent.*

Where an insurance company, to which a policy issued by it is assigned by the insured life, as collateral security for the assured's bond for money loaned to him by the company, it was decreed by Kindersley, V. C., that the company could not, by assigning the bond to another company, and effecting reinsurance on the life with such other company, disengage itself from its own liability to the representatives of the assured on its policy.<sup>4</sup>

79. *A life policy in favor of a creditor, or other assured, having an assignable interest depending upon another's life, either partially or entirely, or one on which the premium for the whole life has been paid, stands upon the same footing as to the assignment of the policy with the interest upon which it is made, as one against marine or fire risks, and may upon the same principle, be transferred with the debt or other interest, which constitutes its subject-matter.*

*In England, life policies for an annual premium on the assured's own life, or those on another's life, upon an interest that is not assignable, for instance on the life of a relative upon whose bounty the assured depends, appear to be equally assignable with those made upon an interest which is of a transferable character.*

A party whose life was insured, assigned and delivered his policy to one of his creditors as collateral security, ordering the surplus of the proceeds, if any, after satisfying his debt out of other security and the proceeds of the policy, to be paid over to his widow, intending that she should have the benefit of the policy in preference to his creditors. The amount insured being paid over to the assignee, Mr. Chancellor Johnson, of

<sup>1</sup> Saddlers' Co. v. Badcock, 2 Atk. subject. Stout v. City, &c. Ins. Co. 12 Iowa, 371. *Contra*, Peabody v. Wash Ins. Co. 20 Barb. N. Y. 339.

<sup>2</sup> Ellis, Ins. 70.

<sup>3</sup> It was held in Iowa that a policy may be assigned without assigning the <sup>4</sup> Atkinson v. Gylby, 2 De Gex, M. & G. 670; 13 Eng. Law & Eq. 209.

Maryland, decreed that, the creditor, after retaining enough to satisfy his demands, first applying his other collateral security for that purpose, should pay over the surplus to the widow, and rejected the claim of the assured's administrator to an interest in the policy.<sup>1</sup>

It has been held in Maryland that the reasons requiring the assent of the underwriters to an assignment do not apply to life policies,<sup>2</sup> but that the assured, if there is no restriction in the policy, may assign it to any one, whether the assignee has an interest in the life or not;<sup>3</sup> and it has been held in Tennessee that even an express stipulation for notice need not be complied with.<sup>4</sup>

*An assigned policy should be actually or constructively delivered, and due notice given to the underwriters.*<sup>5</sup>

*Where the premium is paid by the debtor whose life is insured, the policy reverts to him on payment of the debt,*<sup>6</sup> but not necessarily to his representatives.<sup>7</sup>

*Delivery and deposit of a life policy was held by Lord Eldon to give a lien to the deposittee against creditors of a bankrupt.*<sup>8</sup>

80. *Policies are usually assigned in writing, but a merely verbal assignment, with delivery of the policy, gives to the assignee an equitable right to the proceeds, where the policy itself contains no provision to the contrary.*<sup>9</sup>

<sup>1</sup> Harrison v. M'Conkey, 1 Md. Ch. Dec. 34. The chancellor distinguishes this case from Pennington Adm'r v. Gettings Ex'r, 2 Gill & J. Md. 208, and Bradley v. Hunt, 5 Gill & J. Md. 54, on the ground that the assured had divested himself of all interest in the policy and all control of it.

<sup>2</sup> New York L. Ins. Co. v. Flack, 3 Md. 341.

<sup>3</sup> Valton v. National Ass. Soc. 20 N. Y. 32.

<sup>4</sup> Mutual Ins. Co. v. Hamilton, 5 Sneed, Tenn. 269. See also Rison v. Wilkerson, 3 id. 565.

<sup>5</sup> Jones v. Gibbons, 9 Ves. Jun 407; Molloy v. French, 13 Ir. Ch. 261; Fortescue v. Barnett, 3 Mylne & K. Ch. 36; Stocks v. Dobson, 17 Jur. 223; Ex parte South, 3 Swanst. 304; Lett v.

Morris, 4 Sim. 607; Williams v. Thorp, 2 Sim. 257; Ryall v. Rowles, 1 Ves. sen. 348; Dearle v. Hall, 3 Russ. 24; Ex parte Monro, Buck, 303; West v. Skip, 1 Ves. sen. 239; Mutual Ins. Co. v. Hamilton, 5 Sneed, Tenn. 269. It is implied, Bunyon, Life Ins. 24, citing Ashley v. Ashley, 3 Sim. 149, that where the interest of the assignee in the life of an insured debtor had ceased and subsequently a new interest had accrued, the policy covered such new interest.

<sup>6</sup> Holland v. Smith, 6 Esp. 11.

<sup>7</sup> Triston v. Hardey, 14 Beav. 232; cited Bunyon Ins. P. 2, ch. 6, sect. 3.

<sup>8</sup> Ex parte Heywood, 2 Rose, 357.

<sup>9</sup> Per Ld. Abinger, C. B., and Parkes, B., 11 Mees. & W. Exch. 10; Wells v. Archer, 10 Serg. & R. Penn. 412. So

81. *After a valid assignment and delivery of the policy to the assignee, and notice to the underwriters, the assignor cannot, by any act of his, intercept or impair the rights of the assignee under the assignment.*<sup>1</sup> An assignment to a subsequent assignee, with notice of the prior assignment, will be subject to it; and *the underwriters, after notice of a valid assignment, will be bound by it, and any payment made by them inconsistent with it will be in their own wrong.*<sup>2</sup>

82. *The legal proceedings on an assigned policy, in common-law courts, must be in the name of the original assured, whom the underwriter has a right to regard as his contracting party, and the assured cannot, without the consent of the underwriter, impose upon him any responsibility to a third person, whereby the rights of the underwriter will be impaired, or his liability enhanced; or will be modified in any respect, any further than to put him under obligation, after notice, to be accountable to the assignee for the amount for which he is liable under the policy. Whatever set-off he was entitled to at the time of notice of the assignment, and whatever other defence he could make against the original assured, he may still make, notwithstanding the assignment.*<sup>3</sup>

a promissory note, payable to order, has been held in Maine to be assignable in equity by parol and delivery merely. *Titecomb v. Thomas*, 5 Me. 282; and see *Vose v. Handy*, 2 Me. 322.

<sup>1</sup> *Boynton v. Clinton*, &c. Ins. Co. 16 Barb. N. Y. 254; *Foster v. Equity*, &c. Ins. Co. 2 Gray, Mass. 216; *Traders' Ins. Co. v. Robert*, 9 Wend. N. Y. 404; *Tillou v. Kingston Ins. Co.* 5 N. Y. 405; *Hobbs v. Memphis Ins. Co.* 1 Sneed, Tenn. 444. *Contra*, *Grosvenor v. Atlantic*, &c. Ins. Co. 17 N. Y. 391; *Bufalo, &c. Works v. Sun Mut. Ins. Co.* ib. 401; *State*, &c. Ins. Co. *v. Roberts*, 31 Penn. St. 438; *Buckley v. Garrett*, 47 Penn. St. 204.

<sup>2</sup> See 2 Duer, Ins. Lect. 9, § 36, and cases there cited in notes; also 1 Greenleaf, Ev. § 190; Daniel, Eq. Pr. by Perkins, 248, n.; and *Hackett v. Martin*, 8 Me. 77; *Hatch v. Dennis*, 10 Me. 244; *Matthews v. Houghton*, ib. 420;

*Frear v. Evertson*, 20 Johns. N. Y. 42; *Traders' Ins. Co. v. Robert*, 9 Wend. N. Y. 404 and 474; *Pollard v. Somerset*, &c. Ins. Co. 42 Me. 221.

Where the payee of a promissory note not negotiable, gave the maker a discharge at the time of its being made, and then assigned it, for a valuable consideration, with intent, by the parties, to defraud the assignee, the latter was held not to be affected by the discharge. *Lyon v. Summers*, 7 Conn. 399.

<sup>3</sup> See *Gourdon v. Ins. Co. of North America*, 3 Yeates, Penn. 327; S. C. 1 Binn. Penn. 430; *Rousset v. Ins. Co. of North America*, 1 Binn. Penn. 429; S. C. *Condy's Marshall*, 287, n.; *Delany v. Stodart*, 1 Term, 22; *Sparks v. Marshall*, 2 Bingh. N. C. 761; *Waters v. Allen*, 5 Hill, N. Y. 421; *Ashley v. Ashley*, 3 Sim. 151; *Grosvenor v. Atlantic F. Ins. Co.* 17 N. Y. 391; *Tennessee* see *Mar. Ins. Co. v. Scott*, 14 Mo. 46.



83. *If the underwriter has agreed to account and make payment to an assignee, the latter may, at the common law, commence proceedings in his own name, where nothing remains to be done on the part of the assignor; and all his interest in the contract has ceased.*<sup>1</sup>

84. *If the assignment, taken in connection with the policy, plainly transfers the assured's whole interest, the underwriter's assent to it is equivalent to his agreement to be directly answerable to the assignee, and the proceedings to enforce payment may be in the assignee's name.*

This and the preceding proposition are stated as the result of the jurisprudence on the subject, and as reconciling the, in some degree, apparently discordant decisions. The cases on policies, no less than on other contracts, support the doctrine, that an agreement by the obligor to be answerable to the assignee, or his assent to an assignment of such import, substitutes the assignee for the assignor, and authorizes proceedings in the name of the assignee;<sup>2</sup> while in other cases, not discriminating the above-mentioned difference in assignments and assent, the general rule is differently laid down.<sup>3</sup>

An assignment may transfer only a part of the claims accruing to the assured on the policy, as in case of an assignment of all claims for loss under a marine policy to the vendee of the goods thereby insured, which is held not to transfer the claim for a return of any part of the premium previously paid by the assignor.<sup>4</sup>

85. *The assignee of a policy of insurance, or other contract which is assignable in equity, needs not to resort to a court of equity to enforce it. A court of law will recognize his rights under the assignment, and give a remedy in a suit brought by him in the name of the assignor.*<sup>5</sup>

86. *A mere sale and transfer of the assured's interest in the subject insured, does not operate as an assignment of the policy, as incidental to the subject.*

<sup>1</sup> See next proposition.

<sup>2</sup> *Carroll v. Boston Mar. Ins. Co.* 8 Mass. 515; *Howard v. Albany Ins. Co.* 3 Den. N. Y. 301; *Conover v. Mut. Ins. Co. of Albany*, 3 Den. N. Y. 254.

<sup>3</sup> *Jessel v. Williamsburgh Ins. Co.* 3 Hill, N. Y. 88.

<sup>4</sup> *Castelli v. Boddington, and Boddington v. Castelli*, 1 Ell. & B. 66, 16

Eng. L. & Eq. 127; 1 Eng. L. & Eq. 281. See *Hale v. Mich. Ins. Co.* 6 Gray, Mass. 169.

<sup>5</sup> *Carter v. Union Ins. Co.* 1 Johns. Ch. N. Y. 463; *Welch v. Mandeville*, 1 Wheat. 233; *Mandeville v. Welch*, 5 id. 277. A statute of Pennsylvania authorizes proceedings in the name of the assignee. 1 Binn. Penn. 483.

87. Accordingly, *if property insured is sold, so that the assured retains no interest in it, and is subject to no risk or responsibility on account of it, and no assignment, or agreement for the assignment, of the policy is made, and afterwards a loss happens, and after the loss the policy is assigned to the vendee, the assignment will be ineffectual in respect to such loss, and neither the party originally insured nor his assignee can recover for the loss.*<sup>1</sup>

88. *Whether on an absolute sale of the insured subject pending the risk without condition or reservation, so that no insurable interest can revert to the assured, and without any agreement or understanding, express or implied, respecting the assignment of the policy, the policy becomes extinct, so that it cannot be afterwards assigned to the vendee before any loss occurs? or avail the assured on his regaining his insurable interest?*

The question supposes the subject and the risk still to correspond to the description in the policy.

Take a case of the absolute sale of a vessel insured for a period, the whole premium having been paid, and a repurchase, before the expiration of the period. As the risk is supposed to have commenced, the assured would not be entitled to a return of any part of the premium, if there had been no agreement to that effect. In case of the risk reviving on the repurchase, the assured loses the premium only for the time during which the vessel belonged to the vendee, instead of losing it for the whole remainder of the period, as he otherwise would have done.

It is distinctly implied, though not directly decided, in a Massachusetts case,<sup>2</sup> that the risk would revive on the repurchase. It would not revive to cover any intermediate loss, since the assured, having had no interest in the mean time, could not sustain any loss. And, in case of an intermediate total loss, the policy would have become extinct.

There are, as we shall see in another place, not unfrequent

<sup>1</sup> *Lynch v. Dalzell*, 4 Brown, Parl. Cases, Tomlins's ed. 431; *The Saddler's Co. v. Badcock*, 2 Atk. 554; *Godin v. London Ass. Co.* 1 Burr. 489; *Keny*. 244; 1 W. Blackst. 103; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. N. Y. 385; *Macarty v. Com. Ins. Co.* 17 La. 366; *Dadmun Manuf. Co. v. Worcester Fire Ins. Co.* 11 Metc. Mass. 429; *Bates v. New*

*York Ins. Co.* 3 Johns. Cas. N. Y. 238; *Howard v. Albany Ins. Co.* 3 Den. N. Y. 301; *Leavitt v. Western Mar. & Fire Ins. Co.* 7 Rob. La. 351; *Powles v. Innes*, 11 Mees. & W. Exch. 10; *Wilson v. Trumbull, &c. Ins. Co.* 19 Penn. 372; *Felton v. Brooks*, 4 Cushing, Mass. 203.

<sup>2</sup> *Carroll v. Boston Mar. Ins. Co.* 8 Mass. 515.

instances of the suspension and subsequent revival of the risk, to which the underwriter cannot object, as he is in that case a gainer by receiving the premium for a time, without running any risk, and his claim to receive it upon those terms for a still longer time could not be made but with a very ill grace. So long, then, as the subject and the risk remain the same that they are described to be in the policy, we have ground for the doctrine that, *if the assured, after parting with his interest, regains it, the policy will reattach*, in case of no prejudice to the underwriter.

It follows, that the assured continues to have an interest in the policy during the interruption of the risk for want of a subject-matter to which it can attach.

I conclude, that, though the subject may have been absolutely transferred pending the risk, and *the risk* may have been thus interrupted, it *will revive by an assignment of the policy to the vendee of the subject, and cover subsequent losses*.

89. *If the assured sells, agreeing to stand trustee of the subject for the vendee, he will hold the policy as such.*<sup>1</sup>

90. *If the sale of the subject is conditional, and the vendor retains an insurable interest as mortgagee, or guarantor, as to the perils insured against in the policy, the policy is not annulled, but remains in force, unless the transfer, or subsequent risk, is in contravention of some express or implied obligation of the assured.*<sup>2</sup>

91. *If a party who has an interest in preserving or insuring a subject, whether by reason of his property in it, or lien upon it, or a liability he may be under respecting it, agrees with another, who has an insurable interest in it, to insure it for such other's benefit, in the name of either, and effects insurance in terms importing that it is for the benefit of such other, or consistent with such construction, this is a constructive equitable assignment of the policy to such other, where an assignment or trust is requisite to give such other the benefit of the contract.*<sup>3</sup>

A debtor agreed to effect a policy on his life for the benefit of a creditor, and to assign it to him and leave it in his hands, and in

<sup>1</sup> Powles v. Innes, 11 Mees. & W. Exch. 10; Reed v. Cole, 3 Burr. 1512.

<sup>2</sup> Bell v. Western Mar. & Fire Ins. Co. 5 Rob. La. 423.

<sup>3</sup> National Ins. Co. v. Crane, 16 Md. 260.

pursuance of that agreement effected a policy in his own name, expressed to be payable to the creditor. This was decreed, in England, by Wigram, V. C., to give to the creditor an equitable interest in the policy, though it had not been assigned to the creditor, or left in his hands.<sup>1</sup>

A purchaser of one of the tenements insured by a policy, was admitted by the insurance company, being a mutual one, as a member in respect to the purchased tenement, at the request of the vendors, and it was held in South Carolina that this was a sufficient assignment of an interest in the policy to be the ground for the grantor's recovering of the grantee the proportion of premium previously paid by the grantor, on account of the unexpired risk on the conveyed tenement at the time of the conveyance.<sup>2</sup>

Wool was delivered to the manufacturer to be manufactured, and, on payment being made therefor, it was to become his, on an agreement that he should effect insurance upon it, in the mean time, for the benefit of the owner; and, in pursuance of the agreement, he insured it in his own name. It was held in Massachusetts, that the owner had such an insurable interest in the policy as to prevent a creditor of the manufacturer from availing himself of the proceeds of the policy by means of a foreign attachment.<sup>3</sup> That is, the manufacturer was considered to hold the policy as trustee for the owner of the wool.

92. *A general assignment of the property of the assured, including the subject of a policy of insurance, with apt words for transferring policies of insurance or other choses in action, will be operative, as an equitable assignment of a policy, at least where the policy contains no restriction against its assignment.*<sup>4</sup> And it

<sup>1</sup> Cook v. Black, Trustee of the Britannia Life Ins. Co. reported 2 Jones's Annuities, p. 1186. In Paradise v. Sun Mut. Ins. Co. 6 La. Ann. 596, an insurance of freight for whom it may concern by the assignee of the freight-list in his own name, to whom it is assigned as collateral security for advances, with an agreement that he shall insure it and charge the premium to the assignor, and account to the assignor for the surplus of the proceeds of the policy after reimbursement of his advances, is, under the

particular circumstances, construed by Eustis, C. J., and his associates, to be subject to the same exceptions of risks to be run by the insurers, that it would be subject to if it had been made in the name of the ship-owner and for his sole benefit. See also Shotwell v. Jefferson Ins. Co. 5 Bosw. N. Y. 247.

<sup>2</sup> Sherman v. Fair, 2 Speers, So. C. 647.

<sup>3</sup> Providence County Bank v. Benson, 24 Pick. Mass. 204.

<sup>4</sup> See No. 2123.



has been held in some cases, that such an assignment will avail, notwithstanding a condition that the policy shall be void on assignment.<sup>1</sup>

93. *Mortgaging the insured premises is not an "alienation," under a provision of the charter of an insurance company making the policy void on an alienation by sale or otherwise.*<sup>2</sup> One ground of the decision is, that the assured still retained his insurable interest to the amount of the full value, which makes the decision applicable to cases of mortgaging by the assured generally.

94. *A policy by a testator on the life of a debtor will pass under a general bequest, as that of "debts and debentures."*<sup>3</sup>

95. Under the English jurisprudence it is necessary, in order to secure the assigned policy to the assignee against the claims of the creditors of a bankrupt or insolvent assignor, that notice of the assignment should be given to the insurers before the act of bankruptcy.<sup>4</sup>

This rule is put upon the ground of a presumption in favor of creditors, that the interest in the policy remains with the assured or other holder of a policy, until the insurers are put under a legal or equitable liability to the assignee by notice of the assignment.

The reason on which that rule is founded is as applicable in the United States as in England. Some American decisions, in analogous cases, are in favor of it,<sup>5</sup> others against it.<sup>6</sup> But the assignment in question surely ought not to put the assignees in any better position than that of an assignee in other cases, and the law is, if it does not, that, *in case the underwriter has notice of the assignment before payment of the loss, whether the assignor is*

<sup>1</sup> See *Lazarus v. General Interest Ins. Co.* 5 Pick. Mass. 76; *Lazarus v. Commonwealth Ins. Co.* 19 Pick. Mass. 81; and *Dadmun Manuf. Co. v. Worcester Fire Ins. Co.* 11 Metc. Mass. 429, in which last case the assignment for the benefit of creditors is held to be a forfeiture. But see *infra*, No. 107.

<sup>2</sup> *Conover v. Mutual Ins. Co. of Albany*, 3 Den. N. Y. 254; *Shepherd v. Union, &c. Ins. Co.* 38 N. H. 232. And see *infra*, No. 880.

<sup>3</sup> *Phillips v. Eastwood, Lloyd & G. Cas.* 291, temp. Sugden.

<sup>4</sup> *In re Hennessy*, 2 Drur. & Warr. Ir. Ch. 555; *Williams v. Thorpe*, 2 Sim. 257; *Ellis, Ins.* 144; *Ex parte Colvill et al.*, 1 Mont. 110; *S. C. Ellis, Ins.* 148; *Smith v. Smith*, 1 Tyrwh. 52; 2 *Crompt. & M. Exch.* 231; *Gardiner v. Lachlan*, 4 Mylne & C. 129; *Ex parte Waithman*, 2 Deac. & C. 412.

<sup>5</sup> *Woodbridge v. Perkins*, 3 Day, Conn. 364; *Judah v. Judd*, 5 Day, Conn. 534.

<sup>6</sup> *Dix v. Cobb*, 4 Mass. 512; *Stevens v. Stevens*, 1 Ashm. Penn. 190; *Stockton v. Hall*, Hard. Ky. 160.

*solvent or has become insolvent after the assignment, he is liable to the assignee, claiming against the other creditors under insolvency or bankruptcy. This I understand to be the law on the subject in the United States.*

96. *Where notice to the insurers prior to an act of bankruptcy, is necessary to the validity of the assignment of a policy, as against the claims of the creditors of an insolvent assured, it is not enough that the assignor is himself an agent of the insurers. The agent's knowledge of the assignment, or notice to him, will not, in such case, be imputed to his principal.*<sup>1</sup>

But where an assured member of a joint-stock company assigns his policy together with the property insured, *the fact that the assignor is a member of the company, and so a copartner with the other members, will affect the company with notice of the assignment, and secure the policy for the benefit of the assignee against a subsequent disposition of it by the assignor.*<sup>2</sup>

97. *The fact of making out a policy with notice to the insurers of an intention to assign it, is held not to be of itself a consent of the insurers to such assignment, where one of the conditions requisite to its assignment has not been complied with.*

Under a provision that the policy should be void if assigned without the written consent of the insurers, a by-law of a fire company provided that policies might be assigned to mortgagees on their signing the premium note. In the written application of the mortgager for a policy, he stated that he proposed the assignment of a certain amount of it to the mortgagee, but no specific assignment was made, nor was the premium note signed by the mortgagee, nor was any assent given by the company to an assignment, otherwise than by making out the policy to the mortgager, which contained an express reference to the written application "for a more particular description, as forming a part of the policy." It was held in New York that the act of making out the policy was not a written consent to an assignment of it.<sup>3</sup>

*A mortgagee has a lien for premium paid by him to keep up the policy assigned to him.*<sup>4</sup>

*A life policy, effected as collateral security to the grantor of a*

<sup>1</sup> In re Hennessy, 2 Drur. & Warr. Ir. Ch. 555.

<sup>3</sup> Smith v. Saratoga Mut. Fire Ins. Co. 3 Hill, N. Y. 508.

<sup>2</sup> Duncan v. Chamberlayne, 11 Sim. Ch. 123.

<sup>4</sup> Bunyon, Life Ins. P. 2, c. 2, § 10.

*redeemable annuity, in concurrence with the grantor of the annuity, must be assigned to him on the redemption of the annuity.*<sup>1</sup> But if there is no such concurrence, then no such assignment is to be made.<sup>2</sup>

98. *The mere delivery of the policy, without any other act of assignment, for the purpose of security to the depositary, gives him a lien on the proceeds of the policy, for the purpose of such security or indemnity against other claims on the policy or proceeds of which such depositary had no notice at the time of the delivery of the policy to him.*<sup>3</sup>

99. *Where a policy is delivered to a second assignee, without notice to him, by indorsement on the policy or otherwise, of a prior assignment to another, the second assignment will prevail against the first.*<sup>4</sup>

100. *So an assignment of the policy, with delivery of it, without notice to the assignee of a prior lien, will prevail over the lien, which will not be revived by the policy subsequently coming into the hands of the party who had the lien, for the purpose of prosecuting the claim of the assignee against the underwriters.*<sup>5</sup>

101. *A mere depositary of a policy has not, as such, authority, by any act of his, to give a third party any lien upon it.*<sup>6</sup>

102. *The assent of the insurers to an order, dated after a loss by fire, to "pay the loss" to a third party, does not deprive them of the election reserved in the policy, to rebuild, instead of paying damage.*<sup>7</sup>

103. *A covenant by a tenant to keep premises insured, runs with the land, and enures to the benefit of the assigns of the lessor.*<sup>8</sup>

<sup>1</sup> Bunyon, Life Ins. P. 2, c. 6, p. 256, citing *Williams v. Atkins*, 2 Jones & L. Ir. Ch. 653; *Hawkins v. Woodgate*, 8 Jur. 743; but see *Gottlieb v. Cranch*, 17 Jur. 686.

<sup>2</sup> *Sevier v. Greenway*, 19 Ves. jun. 413; *Law v. Warren*, Drur. Ir. Ch. 31.

<sup>3</sup> *Wells v. Archer*, 10 Serg. & R. Penn. 412. See also *Lazarus v. Commonwealth Ins. Co.* 5 Pick. Mass. 76, and 19 id. 81, and *Charleston Ins. &*

*Trust Co. v. Neve*, 2 M'Mull. So. C. 237.

<sup>4</sup> *Wells v. Archer*, 10 Serg. & R. Penn. 412.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Spring v. S. C. Ins. Co.* 8 Wheat. 268.

<sup>7</sup> *Tolman v. Manufacturers' Ins. Co.* 1 Cush. Mass. 73.

<sup>8</sup> *Vernon v. Smith*, 5 Barnew. & Ald. 1.

104. *In case of the decease of an assured*, where the premium has been paid and the policy survives for a subsequent period, *the question arises whether the equitable interest in it passes by will, or by the laws of distribution of the property, to the same party to whom, or in trust for whom, the insured subject passes.*

The question is stated thus generally for the purpose of suggesting more distinctly to the mind what ought to be the rule. It is obvious that, if the amount paid by the insurers for a loss subsequent to the decease does not go to the same party to whom the insured subject was destined by will, or the laws of descent and distribution of estates, the intent of the deceased is directly contravened. This is equally true, whether he died testate or intestate, since, in the latter case, he is presumed to have intended that his estate should go as it would pass by the laws of descent and distribution, in the form in which he left it at his decease.

In some cases, where a trust existed, or could be presumed, courts have treated the proceeds accordingly.

A tenant for life stated in his will that certain stocks were an investment of the proceeds of an insurance of the real estate, burnt down, and paid for, during the life of a preceding tenant for life, and were parcel of the real estate. The English V. C., Plumer, decreed this disposition of the fund;<sup>1</sup> although it does not appear that either tenant for life had any interest in the fund, otherwise than as such tenant.

In another case, the Vice-Chancellor presumed a renewal of a policy upon a house to have been made by an executrix in trust, as such, instead of being renewed exclusively on her own proper account, the presumption being made for the purpose of rendering the amount, paid by the insurers, auxiliary to giving security for an annuity granted by the testator's will to his widow.<sup>2</sup>

But the doctrine which the courts have generally felt bound to adopt, is, that, in the absence of any destination of the proceeds of a policy by the deceased, through a trust created by his will or otherwise, the devise or bequest of the subject does not cause the policy to pass as incident to it.<sup>3</sup>

<sup>1</sup> Norris v. Harrison, 2 Madd. Ch. 278.

<sup>2</sup> Parry v. Ashly, 3 Sim. Ch. 97.

<sup>3</sup> A policy in favor of an annuitant, on the life of the grantor of the annuity, payable during the life of the grantor



In a case of insurance of chattels, the policy passes with them to the administrator or executor, and is available to the executor for indemnity so long as they remain in his possession in trust, unless the policy contains some provision to the contrary. But in such cases *it does not appear distinctly, in the jurisprudence on the subject, that the proceeds of the policy that come into the hands of the executor as indemnity for a loss that happens after the testator's decease, will be payable to a legatee, to whom an interest in the chattel is bequeathed.* There does not, however, seem to be any difficulty in making such a disposition, since the proceeds of the policy are received by the executor in his capacity of trustee, the same in which he possesses the bequeathed chattel. The cases above referred to, so far as their authority goes, would justify the application of the fund in this way.<sup>1</sup>

An insurance on buildings which survives the original assured, presents difficulties in the way of an equitable disposition of the amounts paid for losses happening after his decease, which the judicial tribunals have generally considered to be insurmountable. No legal tribunal seems to have laid down the doctrine, that the transfer of real estate, by the decease of the assured, carries the policy as incident to the estate, any more than a transfer during his life would have that effect. On the contrary, what there is of jurisprudence on this subject favors the doctrine that the insurance *on real estate* is a personal contract, and that the proceeds of it, if any, go as personal property.<sup>2</sup>

Where buildings were insured in a company, by the articles of which the interest in policies was to survive to executors, Lord Eldon remarked, "It is impossible to make the executor trustee."<sup>3</sup> Equity, and the general principles governing insurance, require a provision in policies upon the subject, or legislative interposition.<sup>4</sup>

does not pass under a bequest of the annuity. *Hamilton v. Baldwin*, 15 Beav. 232, 19 Eng. L. & Eq. 283. In *Wyman v. Wyman*, 26 N. Y. 253, the insurance was held to be realty and to go to the heirs subject to dower, &c. and not to the administrator.

<sup>1</sup> *Durrant v. Friend*, 11 Eng. L. & Eq. 2. In this case the testator and

the chattels were lost by the same peril. Held that the legatee had no interest in the policy.

<sup>2</sup> *Haxall's Ex'rs v. Shippen*, 10 Leigh, Va. 437; *Wyman v. Prosser*, 36 Barb. N. Y. 368.

<sup>3</sup> *Mildmay v. Folgham*, 3 Ves. jun. 472.

<sup>4</sup> Fire policies frequently have pro-

Where a court is not hindered by precedents from equitably effectuating *the intention of the testator in making a devise, or of the law in prescribing the descent of real estates*, such intention seems to authorize and require *the same disposition of the proceeds of the policy as would have been made of the subject of it*, in case no provision in the will of the deceased indicates a different intention. And the same rule seems to be equally applicable to an outstanding claim for a loss, where a different intention is not indicated by some act of the deceased during his life. The rule is no more than equivalent to that of equity, that a fund directed to be converted into real estate shall be treated as such. It is merely holding that the substitute for a piece of real estate or for a part of its value, shall be subject to the same disposition that is made of the subject itself.

105. *Whether, in case of a fire policy having been assigned by the mortgager to the mortgagee, and suit commenced and judgment recovered for a loss in the name of the mortgager for the benefit of the mortgagee, the payment of the debt by the mortgager, before the judgment is satisfied, is a constructive reassignment of the policy and judgment to the mortgager?* It was held in New York, that the payment of the debt to the mortgagee did not operate as a reassignment of the interest in the policy, so as to put the mortgager in place of the mortgagee, and entitle him to the benefit of the judgment, against the insurers, for the loss.<sup>1</sup>

It is so held on the ground that the assignment is equivalent to the making of a new insurance by the mortgagee in his own name, upon his own insurable interest, which is a sufficient basis of an insurance made independently of the mortgager; for the circumstance that the name of the mortgager must be used in the suit is mere matter of form in the remedy, which is not necessary if the assignment is assented to by the insurers. But *in most cases* of such assignments, the premium is paid by the mortgager, and *the assignment of the policy, or the policy itself is, in fact, made to the mortgagee in trust, to apply the proceeds of the policy in repairing damage, or in payment of the debt;* and

visions relative to assignments, and notice thereof to the insurers, but not respecting the payment of a loss to a legatee or devisee.

<sup>1</sup> Traders' Ins. Co. v. Roberts, 9 Wend. N. Y. 474.

*in case of any express or implied understanding to this effect, written or spoken, the mortgager would certainly be required to account for and apply the proceeds of the policy accordingly, and his liability so to do constitutes a sufficient insurable interest, notwithstanding the payment of the debt by the mortgager or any surety of his. The mere statement of the circumstances would, in most cases, plainly import such a relation between the parties to the mortgage and the policy, though nothing were written or said directly upon the subject.*<sup>1</sup>

106. Where a policy is assigned by consent of the underwriters, *reserving all rights of set-off*, the reservation *applies to rights of set-off of contracts or liabilities existing at the date of the assignment.*<sup>2</sup>

107. *A restriction in a policy, that it shall become void by assignment without the consent of the underwriters, is not void, but is to be strictly construed.*<sup>3</sup>

Accordingly, where a policy, containing this restriction, was effected by an agent, expressed to be for a principal named, loss payable to the agent, in whose hands it was left, subject to his lien, it was held in Massachusetts, that the restriction was valid, but that the policy was not made void and forfeited by an assignment by the assured of the steamboat insured, and his other property, including "all policies of insurance," to a trustee for the benefit of his creditors, which was substantially the constituting of an agency and a trust for the management of the property, and applying the proceeds of the policy for the benefit of the assured.<sup>4</sup>

Since a general assignment of property to a trustee, to be managed for the benefit of the assured and his creditors, leaves him to be still a party, and is to be favored by the law, and in fact usually leaves the property to be still managed by the debtor himself, so far as the assignee and creditors can avail of his services for this purpose, and at the most is substantially only the

<sup>1</sup> In the case above cited, the court remark that they do not say what would have been the effect, had the mortgagee assigned his judgment to the mortgager.

<sup>2</sup> *Wiggin v. Suffolk Ins. Co.* 18 Pick. Mass. 145; *Waters v. Allen*, 5 Hill, N. Y. 421.

<sup>3</sup> *Lazarus v. General Interest Ins. Co.* 5 Pick. Mass. 76.

<sup>4</sup> *Lazarus v. Commonwealth Ins. Co.* 5 Pick. Mass. 76; see also *Lazarus v. Commonwealth Ins. Co.* 19 Pick. Mass. 81. See also *Brichta v. N. Y. La Fayette Ins. Co.* 2 Hall, N. Y. 372.

appointment of an agent by the assured to manage the property and apply its proceeds for him, as also those of the policy, it cannot be presumed to be such an assignment as was contemplated by the underwriters in providing the restriction, any more than a transfer by will, on his decease, would be.

108. *The clause against assignment without the consent of the underwriters, does not prevent the assured from making a valid assignment of his claim upon the underwriters after a loss has happened, and the risk has terminated, without such consent.*<sup>1</sup>

SECTION. XI. ALTERATION AND CANCELLING OF THE POLICY.

109. An alteration in the contract is commonly made by an indorsement on the policy, signed by the insurers. *A contract varying the policy, or to cancel it, is as solemn an act as the contract of insurance itself, whether it be done by indorsement or by a separate instrument.*<sup>2</sup>

110. *Alterations duly inserted in a policy by the underwriters, without any new signature, will be valid if assented to by the assured, though merely verbally.*<sup>3</sup>

Where it has been the practice of the company to execute alterations by the secretary, this makes his act valid.<sup>4</sup>

A mutual insurance company of which the assured is a member, cannot, by any vote or regulation adopted subsequently to the issuing of the policy, make any valid alteration of it without the authority or consent of the assured. Such a company stands upon the same footing in this respect as any other company, or as individual underwriters.<sup>5</sup>

<sup>1</sup> *Brichta v. N. Y. La Fayette Ins. Co.* 2 Hall, N. Y. 372; *Perry v. Merchants Ins. Co.* 25 Ala. N. S. 355; *Phillips v. Merrimack Ins. Co.* 10 Cush. Mass. 350; *Mellen v. Hamilton F. Ins. Co.* 17 N. Y. 609; *Goit v. National Protection Ins. Co.* 25 Barb. N. Y. 189; *Courtney v. New York Ins. Co.* 28 Barb. N. Y. 116; *Walters v. Washington Ins. Co.* 1 Clarke, Iowa, 404; *West Branch Ins. Co. v. Helfenstein*, 40 Penn. St. 289; *Carter v. Humboldt Ins. Co.* 12 Iowa, 287. Such an assignment is

subject to the equities between the original parties; *Pupke v. Resolute F. Ins. Co.* 17 Wisc. 378.

<sup>2</sup> *Head v. Providence Ins. Co.* 2 Cranch, 167; *Kaines v. Knightly, Skinn.* 54; *Robinson v. Tobin*, 1 Stark. 336; *Alauzet*, n. 193. See *Baines v. Woodfall*, 6 C. B. N. S. 657.

<sup>3</sup> *Warren v. Ocean Ins. Co.* 16 Me. 439.

<sup>4</sup> *Ibid.*

<sup>5</sup> *New Eng. Mut. Fire Ins. Co. v. Butler*, 34 Me. 451.



111. And so other *underwriters* may be *substituted* for the original one, for any part or the whole of the amount insured, *by indorsement* duly executed by the substituted underwriters, with the verbal consent merely of the assured.<sup>1</sup>

112. *Striking a pen across words without obliterating them*, so as to make them illegible, *and writing others in their stead*, with consent of the underwriters, *is a cancelling* of such words.<sup>2</sup>

113. *A material alteration of the policy by the assured, without the consent of an underwriter, makes the policy void as to such underwriter, though it is made without any fraudulent purpose*, but with the intent to obtain the underwriter's consent.<sup>3</sup> The underwriter is not liable on the instrument executed by him, which has thus been voluntarily cancelled, and not on the altered instrument, since he is not a party to it.

But where divers underwriters subscribe the same policy, any agreement by one of them in a separate instrument, without erasure or additions in the policy itself, will not affect it in respect to the others.<sup>4</sup>

In a policy on a voyage "from Cuba to Liverpool," the assured inserted "with leave to call off Jamaica," intending to get the assent of the underwriters; all of whom assented except one, in a suit against whom, Dallas, C. J., Park, J., Burrows, J., and Richardson, J., of the English Court of Common Pleas, held that the policy was thus made void as against the defendant. Dallas, C. J.: "It is clear that an alteration in a material fact will render an instrument void. In this case, the alteration, when made, was material."<sup>5</sup>

Lord Ellenborough ruled in like manner in a similar case.<sup>6</sup>

114. *An immaterial alteration*, at least if honestly made, *does not annul the contract*.

As where the assured inserted a clause giving a liberty, which was authorized by the policy as originally executed, with the

<sup>1</sup> Merry v. Prince, 2 Mass. 176. So alterations may be indorsed. Driggs v. The Albany Ins. Co. 10 Barb. N. Y. 440.

<sup>2</sup> Fairlie v. Christie, 7 Taunt. 416.

<sup>3</sup> Masters v. Miller, 4 Term, 320; Sanderson v. McCullom, 4 J. B. Moore,

5; Laird v. Robertson, 4 Brown, Parl. Cas. by Tomlin, 488.

<sup>4</sup> Alauzet, n. 193, Vol. I. p. 360.

<sup>5</sup> Forshaw v. Chabert, 3 Brod. & B. 158.

<sup>6</sup> Campbell v. Christie, 2 Stark. 64; see also, to the same effect, Langhorn v. Cologan, 4 Taunt. 330.

intention of obtaining the consent of the underwriters to it.<sup>1</sup>

115. *The alteration of the policy by another person than the assured, without his consent or privity, does not render it void.*<sup>2</sup>

## SECTION XII. THE JUDICIAL CORRECTION OF MISTAKES.

116. *If a mistake has occurred in framing the contract, to the correction of which the policy itself affords no clew, it cannot be corrected by a court of law,*<sup>3</sup> which will only construe, and will not reform the contract. The mistake can be corrected only by the consent of the parties, or by a court of equity.

Thus it was held in New York, that a policy on "freight" could not be applied, upon the strength of verbal testimony merely, to any subject different from that to which, by its terms, it appeared to be applicable.<sup>4</sup>

117. *A court of chancery will, upon sufficient proof, correct a mistake in filling up the policy.*<sup>5</sup>

Lord Chancellor Hardwicke says: "No doubt this court has jurisdiction to relieve in regard to a plain mistake in contracts in writing, as well as against frauds in contracts, so that if reduced

<sup>1</sup> Sanderson v. Symonds, 1 Brod. & B. 426; Sanderson v. McCullom, 4 Moore, 5. I am indebted to Judge Duer, for pointing out the error in stating these two cases in my early editions. See also Falmouth v. Roberts, 5 Mees. & W. Exch. 469.

<sup>2</sup> Langhorn v. Cologan, 4 Taunt. 330; Nichols v. Johnson, 10 Conn. 192.

<sup>3</sup> Cheriot v. Barker, 2 Johns. N. Y. 346; Constable v. Noble, 2 Taunt. 403; Manly v. United Mar. & Fire Ins. Co. 9 Mass. 85. In Bates v. Grabham, 2 Salk. 444, Holt, C. J., cites, with apparent approbation, a case which he says was decided in Chief Justice Pemberton's time. "An insurance was made from Archangel to the Downs, and from thence to Leghorn, but there was a parol

agreement that the policy should not commence till the ship came to such a place. And it was held that the parol agreement should avoid the writing." But Chief Justice Pemberton seems to have entertained a different opinion. "Policies," he said, "were sacred things, and a merchant should no more be allowed to go from what he had subscribed in them, than he that subscribes a bill of exchange." Kaines v. Knightly, Skinn. 54.

<sup>4</sup> Mellen and Nesmith v. National Ins. Co. 1 Hall, N. Y. 452; and see Chamberlin v. Harrod, 5 Me. 420.

<sup>5</sup> Implied by Lord Eldon, 5 Bos. & P. 322; Livingston, J., Graves v. Mar. Ins. Co. 2 Caines, N. Y. 339; and Washington, J., Hogan v. Delaware Ins. Co. 1 Wash. C. C. 419.

into writing contrary to the intent of the parties, on proper proof, that would be rectified. But there ought to be the strongest proof possible.<sup>1</sup>

The Supreme Court of the United States assumes, very distinctly, that a court of equity may correct a mistake in a policy.<sup>2</sup>

Mr. Justice Story says, on the same subject :<sup>3</sup> "There cannot be any doubt that a court of equity has authority to reform a contract, where there has been an omission of a material stipulation by mistake. A policy of insurance is within this principle. But a court ought to be extremely cautious in the exercise of such an authority. It ought to withhold its aid where the mistake is not made out by the clearest evidence."<sup>4</sup>

A case occurred in 1739, before Lord Hardwicke, on a policy upon the ship *Eyles*, the risk being described to commence "from" and immediately "after" her departure from Fort St. George. In another part of the policy the risk was described to be "at and from" that port. In the "label," signed by the agent of the assured and two of the directors of the insurance company, whereby the policy was agreed for, the risk was described to be "at and from" Fort St. George. It was not disputed by the insurers that it was the intention of both parties that the policy should be so made. It seems also that the label was considered of great authority in practice. One of the counsel remarked, that "merchants rely so much upon the label, that the policy is rarely made out, in many instances, unless in case of loss." Lord Hardwicke decided that the policy should be considered to be "at and from."<sup>5</sup> In this case the policy itself appears to have authorized such construction. It seems, however, to have been assumed that the court had authority to reform it by the label.

A New York case supplies a precedent of the direct exercise of the authority of a court of chancery in ordering a correction of

<sup>1</sup> *Henkle v. Royal Exch. Ass. Co.*  
<sup>1</sup> Vez. sen. 317.

<sup>2</sup> *Graves v. Boston Mar. Ins. Co.* 2  
Cranch, 441. See also *Baker v. Paine*,  
<sup>1</sup> Vez. sen. 456.

<sup>3</sup> *Lyman v. United Ins. Co.* 2 Johns.  
Ch. N. Y. 630.

<sup>4</sup> *Andrews v. Essex Fire & Mar. Ins.*  
Co. 3 Mas. C. C. 6. See also *Delaware*  
*Ins. Co. v. Hogan*, 2 Wash. C. C. 4 ;  
*Bell v. Western Mar. & Fire Ins. Co.*  
5 Rob. La. 423.

<sup>5</sup> *Motteux v. London Ass. Co.* 1 Atk.  
Ch. 545.

a mistake in filling up a policy, on the application of the assured, the mistake being distinctly proved.<sup>1</sup>

## SECTION XIII. LEADING PRINCIPLES OF CONSTRUCTION. — USAGE.

118. *It is proposed to introduce in this place only such leading doctrines on the construction of policies of insurance as seem to be properly preliminary to the subsequent chapters.*<sup>2</sup>

119. *The subject-matter of marine insurance and other written mercantile contracts, makes it necessary to go out of the written instruments, in order to interpret them, more frequently than in most other contracts.*

It was early laid down as a rule, that, in determining the meaning of a policy, regard must be had to the course of the trade to which it relates.<sup>3</sup>

The mere description of a voyage or adventure for which the insurance is made, includes the risks according to the usual mode of pursuing it.

Thus a voyage from A to B may include, by implication, the liberty of touching at C.

A "whaling voyage," by the import merely of that designation, includes the liberty of touching at the usual places for supplies, or other usual purposes of such a voyage, and also that of agreeing on a partnership, or "mateship," with other vessels.<sup>4</sup>

Accordingly, in marine policies a great many stipulations are impliedly included in a few short phrases, which stipulations are not obvious on the face of the instrument, except to persons conversant in the trade referred to.

Hence a notion seems to have been entertained, that the principles of construing this contract are not the same that are applicable to others. It is said that "policies are to be construed

<sup>1</sup> Phoenix Fire Ins. Co. v. Gurnee, 1 Paige, Ch. N. Y. 278. See also Collett v. Morrison, 9 Hare, Ch. 162; 12 Eng. L. & Eq. 171; Oliver v. Mutual Ins. Co. 2 Curt. C. C. 277; Union Ins. Co. v. Commercial Ins. Co. ib. 524; Woodbury &c. Assoc. v. Charter Oak Ins. Co. 31 Conn. 517.

<sup>2</sup> The subject of construction will again recur frequently, especially under the head of Risks and Evidence.

<sup>3</sup> Lethulier's case, 2 Salk. 443, A. D. 1692.

<sup>4</sup> Child v. Sun Mutual Ins. Co. 3 Sandf. N. Y. 26.



largely,"<sup>1</sup> according to the intention of the parties, and for the indemnity of the assured and the advancement of trade.<sup>2</sup>

120. *The principles of construction are, however, the same in regard to this, and all other contracts in writing, in which the intention of the parties is always to be sought for in the instrument itself.*

"If," says Emerigon, "the stipulations of the policy are clear and contain nothing prohibited by law, the court is not permitted to stray out of them."<sup>3</sup>

Lord Kenyon says: "It would be attended with great mischief and inconvenience, if, in construing contracts of this kind, we were not to decide according to the words used by the contracting parties;"<sup>4</sup> and Lord Ellenborough, "that the same rule of construction which applies to other instruments, applies equally to this, namely, that it is to be construed according to the sense and meaning, as collected in the first place from the terms used in it, which terms are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some other special and peculiar sense."<sup>5</sup>

The principle of construing according to the intention applies to other instruments as well as policies. "There are many cases on the construction of bonds, where the letter of the condition has been departed from, to carry into effect the intention of the parties."<sup>6</sup> That policies of insurance are governed by the same laws of construction as other written contracts, has been many times decided directly or in effect.<sup>7</sup> And though, in a *written commer-*

<sup>1</sup> Lee, C. J., in *Tierney v. Etherington*, 1 Burr. 348, A. D. 1743.

<sup>2</sup> Park, 49; Per Yates, J., 2 Binn. 373. And see *Dow v. Whetten*, 1 Hall, N. Y. 174.

<sup>3</sup> Chap. 1, sect. v. § 1.

<sup>4</sup> *Aguilar v. Rodgers*, 7 Term, 421.

<sup>5</sup> *Robertson v. French*, 4 East, 135. And see *Illinois Mutual Ins. Co. v. O'Neile*, 13 Ill. 89.

<sup>6</sup> Per Marshall, C. J., *Cooke v. Gratham*, 3 Cranch, 235.

<sup>7</sup> Per Kent, J., *Goix v. Low*, 1 Johns. Cas. N. Y. 341; Per Livingston, J., *Mumford v. Hallet*, 1 Johns. N. Y. 433; and Marshall, C. J., *Graves v. Boston Mar. Ins. Co.* 2 Cranch, 419. See also *Hogan v. Delaware Ins. Co.* 1 Wash. C. 419; *Slegt v. Rhinelander*, 1 Johns. N. Y. 192; *S. C. in Error*, 2 Johns.

*cial contract*, it is necessary to go out of the instrument itself to interpret it, more frequently than in most others, yet the instrument, being understood, *is conclusive of the rights and liabilities of the parties*; and its provisions are not subject to be controlled and superseded by preliminary negotiations, or communications, or by verbal agreements.<sup>1</sup>

121. *The validity and construction of a policy of insurance, as of other instruments, are governed by the laws of the place where it was made, and of the places to which it has reference in respect to acts to be done under it.*

A policy made by a mutual fire insurance company in New York, on property in Ohio, on an application transmitted by their agent in Ohio with the premium note, the policy being transmitted directly to the assured, and not through the agent, was held, in a suit on the premium note in New York, not to be in contravention of a law of Ohio providing that "no policy should be signed, issued, and delivered," in that State, by a company not chartered by that State, or by an agent not licensed there.<sup>2</sup>

122. *A policy of insurance, or any other written contract, must be taken in the sense in which the parties respectively and reciprocally were authorized to intend and understand it, and no other construction can be put upon it by means of parol testimony.*<sup>3</sup>

Thus, where a part-owner insures in his own name, and nothing in the policy indicates the interest of another, it is not permitted to apply the contract to the interest of another part-owner, for whom he is not a trustee.<sup>4</sup>

The rule is the same in respect to the subject insured. A

N. Y. 531; and see also 2 Johns. N. Y. 351.

<sup>1</sup> See *Bell v. Western Mar. & Fire Ins. Co.* 5 Rob. La. 423; *Phoenix Fire Ins. Co. v. Gurnee*, 1 Paige, Ch. N. Y. 278; *Eyre v. Marine Ins. Co.* 6 Whart. Penn. 247; *Hutchinson v. Bowker*, 5 Mees. & W. Exch. 542; 8 id. 823.

<sup>2</sup> *Hyde v. Goodnow*, 5 N. Y. 266. But though the thing agreed to be done in another place be lawful there, the contract will be void, if it be a violation

of the laws of the place where it is made. See also *St. John v. American Ins. Co.* 2 Du. N. Y. 419; *Ruse v. Mutual, &c. Ins. Co.* 23 N. Y. 516.

<sup>3</sup> *Sheldon v. Hartford F. Ins. Co.* 22 Conn. 235; *Liddle v. Market, &c. Ins. Co.* 4 Bosw. N. Y. 179.

<sup>4</sup> *Finney v. Bedford Com. Ins. Co.* 8 Metc. Mass. 348; *Cookendorper v. Preston*, 4 How. 317; *United States v. McDaniel*, 7 Pet. 1.

policy on "fixtures" cannot be applied to movable furniture, upon parol evidence of an intention that it should be so applied.<sup>1</sup>

Where a reinsurer agreed to "reinsure to a certain amount, and make good all loss or damage" to an underwriter against his risk on a fire policy, whereby a greater amount had been insured by him, the court refused to admit testimony, that, according to usage, the reinsurer was liable to make good only such proportion of the loss as the amount reinsured bore to that originally insured; such evidence being contradictory to the indisputable sense of the policy of reinsurance.<sup>2</sup>

A policy being on "coffee and other goods without exception, either on board the J. S. or in store No. 37," &c., parol evidence was held not to be admissible for the purpose of proving that the policy was intended to be applicable only to such goods in No. 37 as were not insured in a prior policy, on the ground that such evidence would be contradictory to the written contract.<sup>3</sup>

123. *A court, in selecting among different meanings of which the phraseology is susceptible, will avoid such as are absurd or lead to unreasonable or inconvenient consequences.*<sup>4</sup>

124. *The predominant intention of the parties in a contract of insurance is indemnity, and this intention is to be kept in view and favored in putting a construction upon the policy.*

125. In determining the construction of written instruments consisting of a printed form, the blanks in which are filled in manuscript, as is usual with policies of insurance, "*the words superadded in writing are entitled to have a greater effect attributed to them than the printed words, and may supersede them, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning.*"<sup>5</sup>

<sup>1</sup> Holmes v. Charlestown Mar. & Fire Ins. Co. 10 Metc. Mass. 211.

<sup>2</sup> Hone v. Mutual Safety Ins. Co. 1 Sandf. N. Y. 137; Mutual Safety Ins. Co. v. Hone, 2 N. Y. 235.

<sup>3</sup> Stacey v. Franklin Fire Ins. Co. 2 Watts & S. Penn. 506; Mercantile Ins. Co. v. State Ins. Co. 25 Barb. N. Y. 319.

<sup>4</sup> Eyre v. Marine Ins. Co. 5 Watts & S. Penn. 116; and see 1 Greenleaf, Ev. § 288; Emerigon, Ins. c. 1, sect. vii. §§ 3, 4.

<sup>5</sup> Lord Ellenborough, in Robertson v. French, 4 East, 130; Coster v. Phoenix Ins. Co. 2 Wash. C. C. 51; Wallace v. Insurance Co. 4 La. 289;

"As where the word 'ship' is written in the margin of a policy; or 'freight,' or 'goods;' the general terms of the policy, applicable to other subjects besides the particular one mentioned in the margin, are thereby considered as narrowed in point of construction to that one."<sup>1</sup>

126. *Extrinsic evidence may be introduced to explain ambiguities and words and phrases of indeterminate meaning, in policies of insurance, upon the same principles, and subject to the same rules, that are applicable to other written contracts.*<sup>2</sup>

127. *A written contract is presumed to take effect at its date, if nothing to the contrary appears upon its face, but it may be proved by the testimony of witnesses that it was delivered and took effect on a day subsequent.*<sup>3</sup>

An instrument is of no force so long as it remains in the hands of the obligor, and not actually or constructively delivered; and contracts are often, perhaps most frequently, so worded, as not to be inconsistent with the fact of their delivery on a day different from the date.<sup>4</sup>

128. *So it may be proved aliunde, that a policy was executed on a day subsequent to the date which it bears.*<sup>5</sup>

129. *In construing all written documents, and a policy of insurance no less than others, the construction of particular parts may be determined by the subject-matter of the writing.*

Thus, where liberty was given to cruise six weeks, Lord Mans-  
Delonguemere v. Tradesmen's Ins. Co. 2 Hall, N. Y. 589; Wall v. Howard Ins. Co. 14 Barb. N. Y. 383; Moore v. Perpetual Ins. Co. 16 Mo. 98; Leeds v. Mechanics' Ins. Co. 8 N. Y. 351; Mobile Mar. Ins. Co. v. McMillan, 27 Ala. N. S. 77; Bargett v. Orient Ins. Co. 3 Bosw. N. Y. 385; Woodruff v. Commercial Ins. Co. 2 Hilt. N. Y. 122; Phoenix Ins. Co. v. Taylor, 5 Minn. 492; Benedict v. Ocean Ins. Co. 31 N. Y. 389.

ton v. Greenwood, 4 Dougl. 28; Clark v. Baker, 11 Metc. Mass. 586; Eaton v. Smith, 20 Pick. Mass. 150; Emerigon on Ins. c. 1, sect. vii. § 4. Instruments are to be construed with reference to the "surrounding circumstances." Hiscocks v. Hiscocks, 5 Mees. & W. Exch. 363; Place v. Delegal, 6 id. 492; Liberty Hall Ass. v. Housatonic Ins. Co. 7 Gray, Mass. 261.

<sup>3</sup> Stone v. Bale, 3 Lev. 348; Lorent v. S. C. Ins. Co. 1 Nott & M'C. So. C. 505; Philadelphia L. Ins. Co. v. American L. Ins. Co. 23 Penn. St. 65.

<sup>4</sup> See Jackson v. Bard, 4 Johns. N. Y. 230.

<sup>5</sup> Hall v. Cazenove, 4 East, 477.

<sup>1</sup> 4 East, 140. See also Robinson v. Tobin, 1 Stark. 336; Marshall, Ins. by Condry, 304, 305; 1 Greenleaf, Ev. ed. 1842, p. 317, § 278.

<sup>2</sup> See 1 Greenleaf, Ev. §§ 287, 288; Peisch v. Dixon, 1 Mas. C. C. 10; Pres-



field ruled, merely in consideration of the subject-matter of the policy, that this meant six consecutive weeks, without recurrence to any testimony as to usage, or common understanding of this language, as influencing the construction.<sup>1</sup>

130. *The literal and more obvious meaning of a clause may be controlled by other parts of a policy or other written instrument, taking the whole together, or by other documents referred to in it.*

Thus, in an action on a policy "at and from London to all ports and places on this side and on the other side of the Cape of Good Hope, forwards and backwards at sea, at all times, on all services, and in all ports and places, until the ship's arrival back again at her last station of discharge at Blackwall or Deptford, upon any kind of goods in the Brunswick, as interest might appear, beginning the adventure upon said goods from the loading thereof on board the said ship at London," Sir J. Mansfield ruled, "that these words, though literally applying only to goods laden in London, must be intended to apply to any goods brought back to London, though they were not the same goods."<sup>2</sup>

So, a fire policy, whereby a building was expressed to be insured to the amount of seven eighths of its value, referred to the statute chartering the company by which it was issued, and its by-laws, as governing its construction, both of which restricted the amount to be insured to three fourths of the value of the building insured, the policy was held to cover only that proportion.<sup>3</sup>

131. *In construing a contract, a provision whereby an obligation is imposed by one party upon the other, is to be taken in the sense in which the other may fairly be supposed to have understood it.*<sup>4</sup>

The underwriters in a fire policy inserted the condition following, namely: "In case the assured shall make other insurance on

<sup>1</sup> Syers v. Bridge, Dougl. 529.

<sup>2</sup> Grant v. Delacour, 1 Taunt. 466, 474.

<sup>3</sup> Holmes v. Charlestown Fire Ins. Co. 10 Metc. Mass. 211.

<sup>4</sup> Sayles v. North Western Ins. Co. 2 Curt. C. C. 610; Klett v. Delaware

Ins. Co. 23 Penn. St. 262; Ætna Ins. Co. v. Jackson, 16 B. Monr. Ky. 242; Western Ins. Co. v. Cropper, 32 Penn. St. 351; National Ins. Co. v. Crane, 16 Md. 260; Franklin Ins. Co. v. Updegraff, 43 Penn. St. 350.

the same property, and shall not, with all reasonable diligence, give notice thereof to this company, and have the same indorsed on this instrument, or otherwise acknowledged and approved by them in writing, then this policy to cease and be of no effect." The assured made other insurance and gave notice of it to the company, whose secretary replied in writing acknowledging the receipt of the notice. Bronson, J., for the court, said: "The assured could not but understand from the answer, that the notice — or the further insurance, if such be the true reading of the clause — was 'acknowledged and approved,' and that nothing further remained to be done." And accordingly it was held that the condition had been complied with on the part of the assured.<sup>1</sup>

Exceptions of risk are to be taken most strongly against the insurer for whose benefit they are intended.<sup>2</sup>

132. *The construction of written instruments is subject to be affected by usage.*<sup>3</sup>

133. *The usages of the trade, as already mentioned, are expressly included in the policy, since the naming or describing of a voyage or other risks comprehends the usages incidental to it.*<sup>4</sup> So the practice of any trade is binding upon those who employ a tradesman.<sup>5</sup>

"Evidence of usage is received," says Mr. Justice Thompson, "for the sake of ascertaining the sense of the parties by their

<sup>1</sup> Potter v. Ontario & Liv. Mut. Ins. Co. 5 Hill, N. Y. 147; and see 1 Duer, Mar. Ins. 200. Pactionem obscuram iis nocere in quorum fuit potestate legem apertius conscribere. Dig. l. 2, t. 14. And see 1 Greenleaf, Ev. 282.

<sup>2</sup> Blachett v. Royal Exch. Ass. Co. 2 Crompt. & J. Exch. 244. See also Palmer v. Warren Ins. Co. 1 Stor. C. C. 360; Donnell v. Col. Ins. Co. 2 Sumn. C. C. 366; Bullen v. Denning, 5 Barnew. & C. 842; The Earl of Cardigan v. Armitage, 2 Barnew. & C. 197; Grant v. Lexington Ins. Co. 5 Ind. 23.

<sup>3</sup> See cases infra. Also 1 Greenleaf, Ev. § 292; also Macomber v. Parker,

13 Pick. Mass. 175; Harris v. Nichols, 5 Munf. Va. 483; Wigglesworth v. Dallison, 1 Dougl. 190; Louisiana Mut. Ins. Co. v. N. O. Ins. Co. 13 La. Ann. 246.

<sup>4</sup> Mason v. Skurrey, Park, Ins. 191; Col. Ins. Co. v. Catlett, 12 Wheat. 383; Noble v. Kennoway, 1 Dougl. 492; Caldwell v. St. Louis Perpetual Ins. Co. 1 Rob. La. 85; Mobile Mar. Ins. Co. v. McMillan, 27 Ala. n. s. 77.

<sup>5</sup> Savill v. Barchard, 4 Esp. 53. So also of any transaction implicated in the contract. Cookendorfer v. Preston, 4 How. 317, as to demand and notice on a note. The doctrine is a familiar one in jurisprudence.

contract made with reference to such usage, for the custom then becomes part of the contract.”<sup>1</sup>

Mr. Justice Sewall says, that, in giving a construction to policies, “there is more than an ordinary reference to established usages, and those, when ascertained and found suitable applications of general principles, or not inconsistent with them, or with the tenor of the contract, are considered as authoritative upon the parties.”<sup>2</sup> And for this reason the contract of insurance is said to have a liberal construction.<sup>3</sup>

“In all matters of trade,” says Mr. Justice Buller, “usage is a sacred thing,<sup>4</sup> and in policies of insurance, in particular, a great latitude of construction, as to usage, has been admitted;” and he even says, that usage not only explains, but also controls the policy,<sup>5</sup> which is true, if “to control” means to interpret the policy, and give a meaning to it different from that imported by the language in its more ordinary acceptation. The common dictionaries are resorted to for the ordinary meaning of words and phrases, and a technical dictionary for the meaning in some art or trade, and the usage of such art or trade is proved by oral testimony for the same purpose. The evidence of usage is introduced to show what is the ordinary meaning of the phraseology in reference to the subject-matter in a particular district and between parties in like circumstances. There is no peculiar sacredness of usage in respect of commercial contracts. The term “control,” in this application, is likely to convey an erroneous meaning; and such erroneous meaning was obviously intended by Mr. Justice Buller, if he used the phraseology reported, for it contrasts “to control” with “to explain,” whereas the doctrine on the subject is, that such extraneous evidence can be introduced for no other purpose than to explain what is written. Evidence of usage cannot be admitted, to control what is written, in contrast with explaining it, since courts not unfrequently pronounce the meaning of the parties to be so plain, on the face of the instrument, as to exclude all evidence to the con-

<sup>1</sup> *Renner v. Bank of Columbia*, 9 Wheat. 581. See 2 Salk. 443; 2 Dougl. 510; 1 Ves. sen. 457; 7 Cow. N. Y. 202; 3 Starkie, Ev. 1034.

<sup>2</sup> *Clark v. United Marine & Fire Ins. Co.* 7 Mass. 365.

<sup>3</sup> *Coggeshall v. American Ins. Co.* 3 Wend. N. Y. 283.

<sup>4</sup> *Newman v. Cazalet, Park*, 630.

<sup>5</sup> *Long v. Allen, Park, Ins.* 589; *Marshall, Ins.* 2d ed. 660; 4 Dougl. 276.

trary. Therefore, judges often say that evidence aliunde is admissible in certain cases "to explain," but they do not say it is so "to control," what is written.<sup>1</sup>

"I know of no rule better established," says Mr. Justice Kent, "than that parole evidence shall not be admitted to disannul or substantially vary, or extend, a written instrument."<sup>2</sup>

*A general usage may be superseded by a local one.*<sup>3</sup>

134. *A usage, in order to affect the parties to a contract, must be conformable to law.* "The usage of no class of citizens can be sustained in opposition to the principles of law."<sup>4</sup>

135. *A usage, in order to affect a contract, must be definite, and brought home to the knowledge of the party to be affected; or from its being well known, or from the particular circumstances, there must be ground to presume that he had notice of it, or that it was his concern to inform himself of it, and not the duty of the other party to inform him.*<sup>5</sup>

136. *A usage, in order to its being obligatory, must be reasonable,*<sup>6</sup> for the courts will not hold parties to be bound by futile or absurd practices, however uniform and well known.

137. *A usage, in order to its affecting the parties to a policy, must appear to be applicable to insurance.*

It was proved to have been usual, in the transportation on

<sup>1</sup> So per Story in the *Reeside*, 2 Sumn. C. C. 567.

<sup>2</sup> *New York Ins. Co. v. Thomas*, 3 Johns. Cas. N. Y. 1. See also *Mumford v. Hallett*, 1 Johns. N. Y. 433; *Cheriot v. Barker*, 2 Johns. N. Y. 446; *Hogan v. Delaware Ins. Co.* 1 Wash. C. C. 419; 2 *id.* 4; *Vandervoort v. Smith*, 2 Caines, N. Y. 155; *Higginson v. Dall*, 13 Mass. 96; *Hall v. Janson*, 4 Ell. & B. 500; 29 Eng. L. & Eq. 111; *Orient Ins. Co. v. Wright*, 1 Wall. 456; *Macomber v. Parker*, 13 Pick. Mass. 175; *Stoeber v. Whatman*, 6 Binn. Penn. 416.

<sup>3</sup> *Baltimore Merchants' Ins. Co. v. Wilson*, 2 Md. 217.

<sup>4</sup> *Homer v. Dorr*, 10 Mass. 26. See *Byrant v. Commonwealth Ins. Co.* 6 Pick. Mass. 131, where it was held that

a usage for the master to sell the cargo, without necessity for so doing, would be an illegal one. See also *Ougier v. Jennings*, 1 Campb. 505, n.; *Barney v. Coffin*, 3 Pick. Mass. 115; *McGregor v. Ins. Co. of Penn.* 1 Wash. C. C. 39; *Eyre v. Marine Ins. Co.* 6 Whart. Penn. 249; S. C. 5 Watts & S. Penn. 116; *Robertson v. Western Fire & Mar. Ins. Co.* 19 La. 227.

<sup>5</sup> *Rogers v. Mechanics' Ins. Co.* 1 Stor. C. C. 603; *Leach v. Perkins*, 17 Me. 462; *Smetz v. Kennedy*, Ril. So. C. 218; *Hermann v. Western F. & Mar. Ins. Co.* 15 La. 517.

<sup>6</sup> Per Shaw, C. J., *Macy v. Whaling Ins. Co.* 9 Metc. Mass. 354; *Leach v. Perkins*, 17 Me. 462; *Crofts v. Marshall*, 7 Carr. & P. 597; *Seccomb v. Provincial Ins. Co.* 10 All. Mass. 305.



the route for which an insurance on cargo was made, to carry articles of the same kind on deck, but this was held not to affect the liability of the insurers, it being shown that the ship-owner was liable in practice for a loss of the goods so carried. That is, the usage though proved did not extend to the liability of the insurers.<sup>1</sup>

So under a policy on "copper" from New York to Taunton, a part of which was carried on deck and a part in the hold, it was proved to be customary to carry the article on deck, but the insurers were held not to be liable for the loss of the part so carried, as the case itself showed it not to be the uniform practice to carry it on deck, and the usage proved was accordingly held not to be applicable, for the purpose of affecting the liability of the underwriters.<sup>2</sup>

But where the usage for an article to be on deck is uniform, or it is invariably on deck under given circumstances, the policy will be subject to the usage.

Thus, under a policy upon "catchings" in a whaling voyage, it was proved to be a general and uniform usage to retain the "blubber" on deck, while the oil was being tried out, and Judge Story ruled that upon such usage the underwriters were liable for a loss upon the "catchings," while in this state, on deck.<sup>3</sup>

It was remarked in one of the above cases,<sup>4</sup> that it had not been proved that insurers had ever paid any loss on the article in question, namely, copper, carried upon deck on the same passage. But such evidence could not have been necessary to fix the liability upon the underwriters, for if a uniform usage to stow the article on deck, had been proved, the insurers would have been responsible, upon the ordinary rule as to usage.<sup>5</sup>

In a Louisiana case, on the question as to a usage for freight

<sup>1</sup> Gould v. Oliver, 2 Mann. & G. 208; S. C. 4 Bingh. N. C. 134.

<sup>2</sup> Taunton Copper Co. v. Merchants' Ins. Co. 22 Pick. Mass. 108.

<sup>3</sup> Rogers v. Mechanics' Ins. Co. 1 Stor. C. C. 603.

<sup>4</sup> Taunton Copper Co. v. Merchants' Ins. Co. 22 Pick. Mass. 108.

<sup>5</sup> In Gould v. Oliver, 2 Mann. & G.

208, it was proved to be usual to carry a part of a full cargo of lumber on deck on board of vessels laden at Quebec for Europe, but that it was also the practice for the owner of the ship to be answerable to the shipper for any part of the deck-load washed overboard or jettisoned.

and passenger steamboats, on their passages on the Mississippi, to take vessels in tow, it was proved that steamboats did take vessels in tow, but it does not appear that it was proved under what particular circumstances this was done, nor that it was uniformly done in the circumstances of the case before the court; it was held that no usage was proved whereby the underwriters were affected, or, in other words, that no such usage of that navigation was shown. Mr. Justice Slidel, in giving the opinion of the court, laid stress upon the fact that no evidence was given that a loss consequent upon such towing had been paid by underwriters, or any such usage recognized by them.<sup>1</sup>

In this case, as well as that in Massachusetts above cited, the evidence of usage was insufficient, and the defect might have been supplied by further evidence of a practice to settle losses by reason of, or notwithstanding, such towing. But this would by no means show that such acquiescence or recognition on the part of underwriters was necessary in order to establish a usage of the navigation and fix a liability upon them.

138. *No particular period is requisite to the establishment of a usage so as to affect contracts. The period during which it has existed, is one of the grounds of a conclusive presumption of its being known to parties.*

“The true test of a usage,” say the Supreme Court of New York, “is its having existed a sufficient length of time to have become generally known.”<sup>2</sup>

To make a usage obligatory on the parties, “it should,” says Mr. Justice Story, “be so well settled, that persons engaged in a trade must be considered as contracting with reference to it.”<sup>3</sup>

Where a trade had existed and been carried on in the same manner for three years, and another similar trade had been carried on in the same manner for many years, it was held to constitute a usage. And Lord Mansfield said, “It is no matter if the usage has only been for a year.”<sup>4</sup>

That is, it is not indispensably requisite that the usage should

<sup>1</sup> *Hermann v. Western Fire & Mar. Ins. Co.* 15 La. 517.

<sup>3</sup> *Trott v. Wood*, 1 Gall. C. C. 443.

<sup>2</sup> *Smith v. Wright*, 1 Caines, N. Y. 45. See also *Renner v. The Bank of Columbia*, 9 Wheat. 581, opinion of Thompson, J.

<sup>4</sup> *Noble v. Kennoway*, 1 Dougl. 510. See also *Bentaloe v. Pratt*, Wall. C. C. 64. See also *Winsor v. Dillaway*, 4 Metc. Mass. 223.

have existed more than a year, and if it has existed for that time, it will not therefore necessarily affect all persons; for one usage may obtain more publicity in a year than another in five or ten years. So a trade may have been carried on but for a year, and during the whole of that time have been carried on in the same way, and therefore an insurance, or any contract relating to it, will, of itself, import that it is conducted in that manner; more especially when another similar trade, as in the case before Lord Mansfield above referred to, has been so conducted for many years.

139. *Occasional instances will not constitute a usage of which parties are presumed to have notice.*

That vessels on a voyage from Liverpool to Jamaica sometimes stopped at the Isle of Man was considered as not constituting a usage so to do.<sup>1</sup>

140. *A usage may be local and confined to the particular place where a contract is made, or may be coextensive with a district or territory, or be general in respect to the subject-matter.*

Mr. Justice Story says, that "the usage or custom of a particular port, in a particular trade, is not such a custom as the law contemplates to limit or control or qualify the construction of contracts of insurance. It must be some known general usage or custom in the trade, applicable and applied to all the ports of the State where it exists, and from its character and extent so notorious, that all contracts of insurance in that trade must be presumed to be entered into by the parties with reference to it as a part of the policy."<sup>2</sup>

But the fact that a usage extends, or does not extend, throughout a State, cannot be a material test. The uniform prevalence of a usage, and its being notorious throughout extensive parts of two States, might be as good ground for imputing a knowledge of it to a party, as prevalence throughout a State. The judge probably had in mind voyages between ports that were at a great distance from each other. But voyages between neighboring ports may establish a usage of their trade so far as parties could

<sup>1</sup> Marshall, Ins. 186; Salisbury v. *ern* Fire & Mar. Ins. Co. 15 La. Townson, Millar, Ins. 418; Taunton 517.

Copper Co. v. Merchants' Ins. Co. 22 <sup>2</sup> Rogers v. Mechanics' Ins. Co. 1 Pick. Mass. 108; Hermann v. West- Stor. C. C. 603.

be presumed to have notice of it; still the question may arise, how far, and under what circumstances, persons not concerned in such trade shall be presumed to have notice of it.

The usage of a single institution, as a bank, may affect a person who does business at the same, where he has notice, or there is ground of a presumption that he has notice of it.<sup>1</sup> A knowledge of the usage of the East India Company is imputed to the owners of ships chartered by that company.<sup>2</sup>

So a knowledge of the usages of a public office, where individual insurers are in the practice of underwriting, is imputed to those who are in the habit of transacting business at such office.<sup>3</sup>

Even the practice of an individual may have the effect of a usage in respect of those doing business with him at his place of business, and who can be considered to be bound, under the circumstances, to take notice of his practice.<sup>4</sup>

In a case between a plaintiff resident at Plymouth, in England, and an underwriter at Lloyd's, in London, Lord Tenterden, speaking of a usage at Lloyd's, said: "The usage in a particular place, or of a particular class of persons, cannot be binding upon other persons, unless the other persons are actually acquainted with the usage and adopt it. Merchants residing in London, and making insurances there, may reasonably be supposed to be acquainted with that usage and to act upon it. But there is nothing in the case to raise such a presumption against the present plaintiff." And the other judges concurred in this opinion.<sup>5</sup>

It appears, therefore, that the territorial extent of a usage, and the number of persons who observe it, are grounds of inference, that those having transactions in a business or trade, are apprised of it, but not the only evidence, for the fact of its being known

<sup>1</sup> *City Bank v. Cutter*, 3 Pick. Mass. 414. See also *Salvador v. Hopkins*, 3 Burr. 1707; *Gregory v. Christie*, 3 Dougl. 419; *Farquharson v. Hunter*, Park, Ins. 84; *Grant v. Paxton*, 1 Taunt. 463.

<sup>2</sup> *Grant v. Delacour*, 1 Taunt. 466.

<sup>3</sup> *Gabay v. Lloyd*, 3 Barnew. & C. 763; and 5 Dowl. & R. 641; *Ougier v. Jennings*, 1 Campb. 505, n., relating to the usage at Lloyd's.

<sup>4</sup> *Loring v. Gurney*, 5 Pick. Mass. 15.

<sup>5</sup> *Bartlett v. Pentland*, 10 Barnew. & C. 760; S. C. 1 Lloyd & W. Cas. 235. See also *Russell v. Bangley*, 4 Barnew. & Ald. 395. See also *Gabay v. Lloyd*, 3 Barnew. & C. 793; S. C. 5 Dowl. & R. 641; also *Lawrence v. Aberdeen*, 5 Barnew. & Ald. 107; and *Scott v. Erving*, 1 id. 605.



to a party, or any grounds of presumption that it is so, may be proved.<sup>1</sup>

141. It follows from the fact that a usage may be local, that *contracting parties are not bound by the usages of other places than that where the contract is made, or to which it has reference.*

The construction of a fire policy on a vessel that was being built in Baltimore, was held not to be subject to the usages of other ports of the United States.<sup>2</sup>

A policy underwritten in New York on a Rhode Island ship and cargo, for a whaling voyage in the Pacific, was held not to be governed by the usage of Nantucket as to similar voyages.<sup>3</sup>

142. *Common words and phrases in contracts are presumed to be used in their ordinary meaning.*<sup>4</sup>

Where it is suggested that a common word or phrase of the vernacular language *has*, in a contract, the *peculiar meaning* of some science, art, or business, though *the meaning* must, in such case, as in others, be determined by usage, yet as local and peculiar usages are not presumed to be known to the courts, they *may be proved by extrinsic evidence*, upon the same principle on which the contract is, in other respects, affected by usages to which it has explicit or implied reference.

143. *So also, if a word or phrase is used not belonging to the common vernacular language*, its meaning must be determined by evidence introduced for the purpose.<sup>5</sup>

144. Jurisprudence abounds in *illustrations* of the meaning of words and phrases used in contracts being determined by evidence of usage.

Where the assured undertook that his vessel should have a *sea-letter* on board; to ascertain what the parties meant, or must be

<sup>1</sup> Bartlett v. Pentland, 10 Barnew. & C. 760; Russell v. Bangley, 4 Barnew. & Ald. 395; Scott v. Irving, 1 id. 605.

<sup>2</sup> Mason v. Franklin Fire Ins. Co. 12 Gill & J. Md. 468. See also Gabay v. Lloyd, 3 Barnew. & C. 763, and other cases, supra, No. 140.

<sup>3</sup> Child v. Sun Mut. Ins. Co. 3 Sandf. N. Y. 26.

<sup>4</sup> Terms of trade are presumed to be used in the meaning of the trade. Wall v. Howard Ins. Co. 14 Barb. N. Y. 383.

<sup>5</sup> 1 Powell on Contracts, 403; 1 Term, 701; 2 Term, 436; 3 Term, 525; 2 Maule & S. 363; 5 Barnew. & Ald. 416; 8 Barnew. & C. 575; Eaton v. Smith, 20 Pick. Mass. 150; Finney v. Bedford Com. Ins. Co. 8 Mete. Mass. 348; Hone v. Mutual Safety Ins. Co. 1 Sandf. N. Y. 137. See also 1 Greenleaf, Ev. c. 15, where the admissibility of parol evidence to determine the construction of writings is, as is usual with the author, treated learnedly, lucidly, and with succinct accuracy.

supposed to have meant, by a "sea-letter," it was necessary to resort to the public statutes and treaties, or the common usage among men of business.<sup>1</sup>

Where a policy provided that no other than a total loss should be paid on "*roots*," and a loss which was not total happened on a quantity of sarsaparilla, the court was of opinion that it should be paid notwithstanding it came literally within the exception, it being shown that the provision was introduced in reference to trade, principally from Connecticut to the West Indies, in "*beets*" and other garden roots, which were green and perishable, whereas the sarsaparilla, being a dry, hard root, is less liable to decay, from its internal qualities, than merchandise in general, and had never been considered, in practice, as one of the articles excepted in the policy.<sup>2</sup>

A question arose under the exception of partial loss on "*corn*," whether "*rice*" was comprehended in that term, and Sir James Mansfield said, that no one reading the policy would be apprised that rice was intended; yet, "if a clear usage to the contrary were shown," rice might be considered as comprehended in the word "*corn*."<sup>3</sup>

In a policy on "*furs*," that word was held to be applicable to bears' skins, and those of various other descriptions, being of a kind chiefly valuable as furs, and it was held also, that, upon the same principle, the ordinary sense of the word, "*skins*" would be

<sup>1</sup> *Slegt v. Rhineland*, 1 Johns. N. Y. 192; *Slegt v. Hartshorne*, 2 id. 531.

<sup>2</sup> *Coit v. Commercial Ins. Co.* 7 Johns. N. Y. 385. The memorandum in this policy was, that "*roots and all other articles perishable in their own nature*," should be free from average unless general, and it would not seem to be a forced construction to qualify the term "*roots*" by reference to the other subjects of the memorandum, and restrain it to such roots as are perishable in their own nature. This would avoid the seemingly great latitude of construction in allowing a party to prove by oral testimony, that, as between the

parties, sarsaparilla is not a root. The court was probably prevented from resorting to the subsequent words, out of respect to one of its former decisions, namely, *Barker v. Ludlow*, 2 Johns. Cas. N. Y. 289, in which it is said that the "*subsequent words are not applicable to the articles previously enumerated, nor can they repel the implication arising from the enumeration of them*." The Commercial Ins. Co. of Charleston, S. C., excludes the question made in the above case, by excepting from particular average "*sarsaparilla and other roots*."

<sup>3</sup> *Scott v. Bourdillion*, 5 Bos. & P. 213.

excluded in construing such a policy; and, though it expressly exonerated the underwriters from particular average on "skins," yet they might be, notwithstanding, liable for a particular average on skins, valuable chiefly as furs.<sup>1</sup>

It was ruled by Abbott, C. J., that, "*cotton in bales*" may be proved to mean, in trade between Liverpool and Alexandria, in "pressed" bales.<sup>2</sup>

In a policy upon a ship and its furniture, the term "*furniture*" was held, by virtue of usage, to include the provisions.<sup>3</sup>

A policy being on a vessel for twelve months, "with liberty of the globe, and, if at sea at the expiration of twelve months, *to continue till arrival* at her port of destination in the United States," it was held in Pennsylvania, that according to usage, this was a trading voyage, and the phraseology was well understood to mean, not that the vessel was, at the end of the twelve months, to be destined directly to the United States, but that it might then be destined and would be covered on a voyage to any foreign port whatsoever.<sup>4</sup>

Under the bill of lading *to deliver goods*, "*the dangers of the seas excepted*," the ship-owner is liable only for loss by fault of the master and mariners.<sup>5</sup>

In deciding on the meaning of "*free from average*," Lord Mansfield referred to the usage which had prevailed in adjusting losses as a ground of construction.<sup>6</sup>

So a policy on "*outfits*" of a whaling voyage was held to be applicable to one quarter of the catchings, on proof of a usage to that effect in New Bedford, where the vessel belonged and the policy was made.<sup>7</sup>

So a policy on a "*whaling voyage*" was held in New York, by virtue of usage, to be applicable to the taking of sea-elephants.<sup>8</sup>

So, under a policy upon "cargo," common usage must determine the application of this term.<sup>9</sup>

<sup>1</sup> Astor v. Union Ins. Co. 7 Cow. N. Y. 202.

<sup>2</sup> Taylor v. Briggs, 2 Carr. & P. 525.

<sup>3</sup> Brough v. Whitmore, 4 Term, 206.

<sup>4</sup> Eyre v. Marine Ins. Co. 5 Watts & S. Penn. 116; S. C. 6 Whart. Penn. 247.

<sup>5</sup> The Schooner Reeside, 2 Sumn. C. C. 567.

<sup>6</sup> Mason v. Skurray, Marshall, Ins. 226.

<sup>7</sup> Macy v. Whaling Ins. Co. 9 Metc. Mass. 354.

<sup>8</sup> Child v. Sun Mutual Ins. Co. 3 Sandf. N. Y. 26.

<sup>9</sup> Houghton v. Gilbert, 7 Carr. & P. 701. In this case Mr. C. J. Tindal stopped the counsel, who was about to

Insurance was made from New York to Batavia and back, "on goods out and the *proceeds* thereof home." The assured proposed to prove, that, according to commercial usage, the term "proceeds" would apply to, and cover, the same goods on the return voyage. This testimony was rejected in the Supreme Court, on the ground that it was inconsistent with the language of the policy. In the Court of Errors, seventeen senators were of opinion that evidence of such a usage was admissible, and five of a contrary opinion; the decision accordingly being that it was admissible.<sup>1</sup>

So the word "*thousand*," used in a lease in reference to rabbits, may be proved to mean, in the place where the leased premises are situated, twelve hundred.<sup>2</sup>

So a "*pocket of hops*," has been proved to mean one hundred weight.<sup>3</sup>

Under a policy on freight from Van Dieman's Land "to port or ports of lading in India, and the *Indian Islands*," the vessel took in a cargo at Mauritius, and the question arose whether this was an "Indian" island. In geographical divisions, it is an African island, but the court held, that if, in commercial language, it was considered an "Indian" island, it would be within the voyage described in the policy. That is, the words of the policy must receive the construction given them by commercial usage.<sup>4</sup>

Where the policy stipulated for payment ninety days after proof and adjustment of the loss, evidence of the meaning of "*proof*," according to usage, was admitted. It was objected that the policy has implicit reference to, and in its construction only comprehends, usages of "trade;" but this objection was not considered by the court to be well made.<sup>5</sup>

Insurance being made "from London to any *port in the Baltic*," the vessel sailed for Revel, in the Gulf of Finland, a distinct

read the definition in a dictionary, (Entick's,) saying it must be left to the knowledge of the jury. But if the question were respecting an ancient usage, contemporary dictionaries and other books would be resorted to necessarily.

<sup>1</sup> Dow v. Whetton, 8 Wend. N. Y. 160.

<sup>2</sup> Smith v. Wilson, 3 Barnew. & Ad. 728.

<sup>3</sup> Spicer v. Cooper, 1 Q. B. 424.

<sup>4</sup> Robertson v. Clark, 1 Bingh. 445; 8 Moore, 622. See Seccomb v. Provincial Ins. Co. 10 All. Mass. 305.

<sup>5</sup> Allegre's Adm'r's v. Maryland Ins. Co. 6 Harr. & J. Md. 408.



sea from the Baltic, according to geographers, but as it was comprehended in the Baltic, in commercial language, the court gave this extent to the term in the policy.<sup>1</sup>

Where a policy was "at and from *Amelia Island*," and the vessel loaded at Tigre Island, it being customary for vessels nominally bound to and from Amelia Island to discharge and load there, the court held, that taking a cargo on board at Tigre Island, and sailing from there, satisfied the terms of the policy;<sup>2</sup> for, this being the voyage usually made by vessels said to sail from Amelia Island, must have been the voyage intended in the policy.

The construction of the policy was affected by usage, in a case where the shipper was to pay for demurrage, unless the cargo should be discharged within *fourteen days*. Lord Eldon said, "If it were left to the construction of law, he should be of opinion that holidays were to be included, but if the fact was clearly made out that the fourteen days meant working days," according to usage and common acceptance, the contract should receive that construction.<sup>3</sup>

Goods being insured to Bordeaux, with an agreement not to abandon if the ship should be "*turned away*," the vessel was forbidden by the French government to enter the Garonne; and it being agreed by the parties, with the acquiescence of the court, that, by the common understanding, the turning away contemplated by the parties was a turning away by blockade, the court did not consider the ship to be "*turned away*" within the meaning of the policy.<sup>4</sup>

Goods insured *at and from Lyme*, were put on board of the vessel at Bridport harbor, a member of the port of Lyme, about nine miles distant from that place. The court said, if the assured could prove any usage for vessels to load at Bridport, under a policy from Lyme, it might make the insurance good. No such usage could, however, be proved.<sup>5</sup>

In the case of a policy "from New York to the *port of Sisal*," there being no "port," in the proper sense of the word, belonging to Sisal, as it has no harbor or haven where ships may lie in

<sup>1</sup> Uhde v. Walters, 3 Campb. 16.

<sup>2</sup> Moxon v. Atkins, 3 Campb. 200.

<sup>3</sup> Cockran v. Retberg, 3 Esp. 121.

<sup>4</sup> Speyer v. New York Ins. Co. 3 Johns. N. Y. 88.

<sup>5</sup> Constable v. Noble, 2 Taunt. 403.

safety, but they lie off in an open roadstead while discharging and loading, the court gave a construction according to the fact, and considered the voyage in the policy to be a voyage to Sisal, as such a voyage is ordinarily performed.<sup>1</sup> Where the policy was "from the last *port* of lading," and the vessel completed her lading off Angostura, which has properly no "port" or harbor, yet the court decided that it should be considered the "last port of lading," within the terms of the policy.<sup>2</sup>

So an insurance of a vessel for four months from St. Michael's to "*any port or ports*," is held to be equivalent to an insurance to "any place or places," and the sailing to a place that had no port, and where vessels are discharged in an open roadstead, was held to be within the policy.<sup>3</sup>

It was the uniform and well-known practice of the British East India Company to reserve in the charter-party the liberty of employing the vessel on an intermediate voyage from one port to another in India. Accordingly, under a policy on a ship employed by the company, though nothing was said of an intermediate voyage in the policy, yet, because the voyage was described to be an "*India voyage*," it was held that the underwriter should be presumed to know what was incident to such a voyage, and that the construction of the contract should be the same as if liberty had been expressly reserved in the policy to make such intermediate voyage.<sup>4</sup>

A vessel was insured either "*with* or without *letter of marque*," the intention of course being to have the liberty of using it, but to what extent, whether in acting on the defensive, or in giving chase to vessels that hove in sight, or in cruising, were questions not settled by the obvious and general import of the words. Lord Ellenborough said: "It may be material to ascertain in what manner parties to contracts containing this form of words have acted upon them in former instances, and whether they have obtained, as between assureds and assurers, any known and definite import."<sup>5</sup>

<sup>1</sup> *De Longuemere v. New York Fire Ins. Co.* 10 Johns. N. Y. 120. See also *Lindsay v. Janson*, 4 Hurlst. & N. Exch. 699.

<sup>2</sup> *De Longuemere v. New York Fire Ins. Co.* 10 Johns. N. Y. 120.

<sup>3</sup> *Cockey v. Atkinson*, 2 Barnew. & Ald. 460.

<sup>4</sup> *Salvador v. Hopkins*, 3 Burr. 1707. See *Seccomb v. Provincial Ins. Co.* 10 All. Mass. 305.

<sup>5</sup> 6 East, 207; *Parr v. Anderson*, 2 Smith, 316.

Goods insured "*till they were safely landed at Leghorn,*" were landed at the Lazaretto, about half a mile from the city of Leghorn, as was customary in regard to goods of the kind insured, where a loss happened upon them before the period of quarantine had expired. Marshall, C. J., giving the opinion of the court: "This cause may be decided upon the usage found in this case, a usage of ancient date and general notoriety. When the parties stipulated that the adventure should continue till the goods were landed in safety at Leghorn, they knew that the place of landing was the Lazaretto, and that the landing would be made under the direction and control of the local authority. This, then, must be the landing contemplated in the policy. . . . Had the parties intended to continue the risk during the continuance of the goods in the Lazaretto, they would have inserted in the policy words manifesting that intention."<sup>1</sup>

145. *A distinct, additional, independent stipulation, not comprehended or covered by the language of the policy, cannot be introduced into it by proof of a usage:—*

As of a usage to give notice of the erection by the assured of new buildings near those insured, where the policy contained no provision which could refer to such usage, or be explained by it.<sup>2</sup>

Where goods were insured "till landed," it was proposed to show that this expression meant till the ship was moored twenty-four hours in safety; but Lord Kenyon would not permit it, because it was inconsistent with the meaning of the policy, which was too clearly expressed to admit of any such explanation.<sup>3</sup>

Where a policy began "S. E. B. on account of        do make insurance," &c., it was held that proof of usage to consider these blanks to be equivalent to the clause "for whom it may concern," was not admissible.<sup>4</sup>

Mr. Chancellor Walworth<sup>5</sup> was of opinion that the blank must be considered as left to be filled up by the nominal assured.

<sup>1</sup> Gracie v. Mar. Ins. Co. 8 Cranch, 75.

<sup>2</sup> Stebbins v. Globe Ins. Co. 2 Hall, N. Y. 632; and see Pawson v. Barneveldt, 1 Dougl. 12, and New York Ins. Co. v. Thomas, 3 Johns. Cas. N. Y. 1.

<sup>3</sup> Parkinson v. Collier, Park, 470.

<sup>4</sup> Turner v. Burrows, 5 Wend. N. Y. 541; 8 id. 144.

<sup>5</sup> Turner v. Barrows, in the Court of Errors, 8 Wend. N. Y. 144.

The judges of the Supreme Court and the Court of Errors of New York were of opinion that the blank was not to be filled at all, and that the words "on account of" might be considered surplusage.

In a suit on a policy made in New York, for a particular average on goods by sea-damage on a voyage from Liverpool to New York, the insurers proposed to prove, that, by a usage of the port of New York and other ports, the production of a report of a survey made on board of the vessel by the port-wardens, or other officers of the port, that the goods were properly stowed and were damaged on the voyage by perils of the sea, was indispensable in order to charge the underwriters. Oakly, J. : "An attempt is made to introduce into the policy a condition that the insurer shall not be responsible unless such damage is ascertained in a particular mode, and that, too, by the act of third persons, over whom the assured has no control. Such a condition would vary the legal obligations of the defendants, as ascertained in the precise language of the policy." It was accordingly held, that proof of such a usage, as an indispensable requisite to the assured's right to recover a loss, was inadmissible.<sup>1</sup>

Under a policy on a voyage from St. Domingo to Nantes, the assured exhibited a letter from the master, saying he expected to sail in October. He sailed on the 11th of that month. Lord Kenyon ruled that parol evidence was admissible to prove the meaning to be that he expected to sail after the 20th, or at least the 15th, of that month.<sup>2</sup> Assuming that this was equivalent, as it seems to be, to the admission of the same testimony to prove the meaning of the same language in the policy itself, it is carrying the doctrine of construction of what is written by parol testimony to a very questionable length.

<sup>1</sup> Rankin v. American Ins. Co. 1  
all, N. Y. 619.

<sup>2</sup> Chauraud v. Angerstein, Peake,  
Cas. 43.



## CHAPTER II.

### WHO MAY BE INSURED.

SECT. 1. Capacity to contract.

2. Alien enemy.

3. National character. — Domicile.

#### SECTION I. CAPACITY TO CONTRACT.

146. INSURANCE is not distinguished from other contracts, in respect to the ability of the parties to contract. *Any one capable of binding himself by a contract may be an insurer;<sup>1</sup> and in general any person, having an insurable interest, may become an assured.*

An incorporated company can make insurance only as its charter authorizes.<sup>2</sup>

#### SECTION II. ALIEN ENEMY.

147. *No contract with the subjects of a hostile state, or on their behalf, is binding.*

During a war, all trading with the public enemy is interdicted, and he is regarded as an outlaw.<sup>3</sup> “No principle of national or municipal law,” says Mr. Justice Story, “is better settled, than that all contracts with an alien enemy, made during a war, are utterly void.”<sup>4</sup>

Accordingly, a contract made, during war, by the subject of

<sup>1</sup> In England, the London and the Royal Exchange Assurance Companies have certain privileges as insurers, which have been complained of, and considered to be prejudicial to trade. See Rep. Com. of H. of Com., A. D. 1810.

<sup>2</sup> *Allen v. Mut. F. Ins. Co.* 2 Md. 111, citing *Adamson v. Kentucky Ins.*

Co. 2 B. Monr. Ky. 470. See also No. 510, beyond.

<sup>3</sup> *The Hoop*, 1 C. Rob. Adm. 196; *Griswold v. Waddington*, 15 Johns. N. Y. 57; 16 id. 438.

<sup>4</sup> *Cargo of the Emulous*, 1 Gall. C. C. 571. See also *Potts v. Bell*, 8 Term, 548; 2 Esp. 612.

one belligerent with that of the other, cannot be enforced, either during the war, or on the return of peace.<sup>1</sup>

148. *It was formerly held, that the contract of insurance might be made in favor of an alien enemy, and enforced in time of war, though it was not the practice to make the policy in his name.*<sup>2</sup> The arguments in favor of keeping up this commercial intercourse with the enemy were drawn, not from any legal principles, but wholly from a supposed interest, the calculation being, that the insurers would receive in premiums more than they would pay in losses.<sup>3</sup> Lord Mansfield favored these insurances upon this ground, though Mr. Justice Buller says, he never could get him to reason upon their legality.<sup>4</sup>

<sup>1</sup> Willison v. Patterson, 7 Taunt. 438; S. C. 1 Moore, 133.

<sup>2</sup> Planché v. Fletcher, 1 Dougl. 238; Gist v. Mason, 1 Term, 84; Lavabre v. Wilson, 1 Dougl. 271. Contracts for the ransom of captured property were another exception to the general rule, and after the war of 1756, between England and France, and during that of 1778, Frenchmen maintained actions in the English courts on ransom bills. Ricord v. Bettenham, 3 Burr. 1734; Cornu v. Blackburne, Dougl. 641. In the former of these actions, Sir William Blackstone is said to have been informed by several eminent jurists of the Continent, that a similar action would have been maintained in their courts. Sir William Scott says, that, "even in cases of ransoms, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill. The action was brought by the hostage for the recovery of his freedom." The Hoop, 1 C. Rob. Adm. 201. But the above actions, brought by Ricord and Cornu, were both brought in the names of the aliens. Lord Kenyon says, Ricord v. Bettenham "was not brought until peace was restored, which gets rid of the objection" to the plaintiff as an alien enemy. Brandon v. Nesbitt, 6 Term, 23. But the action of Cornu v.

Blackburne was brought during the continuance of the war. In Henkle v. Royal Exch. Ass. Co. 1 Vez. sen. 317, determined in 1749, the Chancellor says, "No determination has been, that insurance of enemy's ships during war is unlawful," though trade in general, he says, is so. The French boasted that the English had, during the war ending in 1763, indemnified them by insurances for what they had lost by captures. 2 Valin, 32, a. 2. But perhaps the French had again indemnified the English insurers by premiums. Mr. Marshall, Vol. I. p. 35, &c., goes at some length into the history and discussion of this practice of insurance in behalf of enemy's subjects, and on trade with the enemy. Mr. Duer, Marine Insurance, Vol. I. p. 463, also gives a particular recapitulation and an able exposition of this branch of English jurisprudence.

<sup>3</sup> Weskett, Ins. tit. Enemy.

<sup>4</sup> Bell v. Gilson, 1 Bos. & P. 345. It is somewhere said, that when Frenchmen were insured in England, during a war between the two countries, some French merchants would have themselves fully insured at home, and to three or four times the amount of their interest in England, and then send their vessels out to be captured.

The same arguments might be used in favor of almost every species of commercial intercourse, where it might be supposed that the subjects of the government permitting it would profit more than those of the enemy, and so the enemy be comparatively weakened. Against the expediency of insuring enemies' property, it was urged that it gave to citizens an interest on the side of the enemy. The British parliament has, by two several statutes, prohibited such insurances during the respective wars pending at the time.<sup>1</sup>

149. But the courts have decided that these insurances were illegal, independently of those statutes,<sup>2</sup> and it is well settled, that *an underwriter cannot, under the laws of his own country, bind himself to indemnify an alien for a hostile capture by a ship acting under a commission from his own government, though at the date of the contract the alien may have been a friend*; <sup>3</sup> and that he cannot bind himself to indemnify a person who is at the time an alien enemy against any loss, or contract with him for insurance, or for any other purpose. And *it is indifferent whose name appears in the policy*, for if the interest proposed to be protected is that of an enemy, the contract is void.<sup>4</sup>

150. *Nor is the underwriter liable in such case, after the restoration of peace*, to an action by the assured, who has thus become an alien friend, or a fellow-subject, for a loss on such a policy, that took place during hostilities.<sup>5</sup>

151. *But if an alien enemy has any privilege of trading or holding property, he will have the usual incidents to such privilege*, and, among others, *the right of protecting his property by insurance*.

<sup>1</sup> 21 Geo. II. c. 2; 33 Geo. III. c. 27, s. 4.

<sup>2</sup> *Furtado v. Rodgers*, 3 Bos. & P. 191; where Lord Alvanley gives the opinion of the court very elaborately, which has been confirmed in *Kellner v. Le Mesurier*, 4 East, 396; *Gamba v. Le Mesurier*, 4 East, 407; *Brandon v. Curling*, 4 East, 410; *McConnell v. Hector*, 3 Bos. & P. 113; *De Luneville v. Phillips*, 5 Bos. & P. 97. And see 2 Valin, 32, h. t. a. 2; 1 Emerigon, 128, c. 4, s. 9.

<sup>3</sup> *Furtado v. Rodgers*, 3 Bos. & P.

191; *Kellner v. Le Mesurier*, 4 East, 396; *Gamba v. Le Mesurier*, 4 East, 407.

<sup>4</sup> *Brandon v. Nesbitt*, 6 Term, 23.

<sup>5</sup> *Brandon v. Curling*, 4 East, 410. A previous agreement for copartnership between persons belonging to the opposite belligerent countries, is so suspended, at least, if not extinguished. *Griswold v. Waddington*, 15 Johns. N. Y. 57, 16 id. 438, cited by Mr. Duer, Vol. I. p. 477; *The Boedes Lust*, 5 C. Rob. Adm. 233.

It has been held, that an alien enemy, residing, under a safe-conduct, in a country at war with his own, may bring an action in the courts of that country;<sup>1</sup> and it seems to be a consequence of this rule, that he may make valid contracts. If he have the privilege of holding lands he may, during war, maintain an action for the possession, or other rights growing out of his title,<sup>2</sup> from which it may be inferred, that, if he has the privilege of hiring a house, he may have it insured. If he has a license to carry on a particular trade, he ceases to have a hostile character as respects such trade, and it may be insured;<sup>3</sup> and the other rights incident to the trade, such as that of stoppage in transitu, will be enjoyed by the party licensed.<sup>4</sup> License being granted to three persons to trade with an enemy of Great Britain, a policy in the name of a broker, was made on the adventure, and before the action was brought on the policy, two of the three became themselves alien enemies. It was held that, notwithstanding this circumstance, the broker might recover on the policy.<sup>5</sup> But a license “to A and B on behalf of themselves and other British neutral merchants,” for a particular voyage, will not legalize the interest of one who is an alien enemy.<sup>6</sup>

152. *A neutral may be insured in one belligerent country against capture by the other.*<sup>7</sup>

### SECTION III. NATIONAL CHARACTER. — DOMICILE.

153. In regard to the circumstances which constitute national character, “it is clear by the law of nations, that *the national character of a person, for commercial purposes, depends upon his*

<sup>1</sup> Wells v. Williams, 1 Salk. 45; S. C. 1 Ld. Raym. 282.

<sup>2</sup> Society, &c. v. Wheeler, 2 Gall. C. C. 105.

<sup>3</sup> Hagedorn v. Reid, 1 Maule & S. 567, &c. In Kensington v. Inglis, 8 East, 273, Lord Ellenborough says, the license cannot remove the personal disability of the trader to bring a suit in his own name, yet it purges the trust, so that his agent, in whose name the policy is made, may bring a suit upon

it for his benefit. But in *Usparicha v. Noble*, 13 East, 332, the same judge says, the license may exempt any person, as well as any branch of commerce, from the disabilities and forfeitures arising out of a state of war.

<sup>4</sup> Fenton v. Pearson, 15 East, 419.

<sup>5</sup> De Tastet v. Taylor, 4 Taunt. 233.

<sup>6</sup> Grigg v. Scott, 4 Campb. 339; Holt, 129. Per Gibbs, C. J.

<sup>7</sup> Bell v. Reid, 1 Maule & S. 726.



*domicile.*"<sup>1</sup> "No position is more established than this, that if a person goes into another country and engages in trade, and resides there, he is, by the law of nations, to be considered as a merchant of that country."<sup>2</sup>

"What is a residence, or domicile, is in itself a question of considerable difficulty, depending on a great variety of circumstances, that cannot be enumerated with precision. The active spirit of commercial enterprise increases this difficulty, by increasing the variety of local situations in which the same individual is to be found at no great distance of time."<sup>3</sup>

154. *The circumstances which determine the domicile of a person are, in general, the purpose for which he goes to a country, the time he has remained or proposes to remain there, the extent of his business in comparison with its extent in other places, and his forming there domestic ties and an establishment, or retaining them in the place of his former residence.*

155. *In determining national character, the purpose for which a person takes up his residence in a country is of weight, but not always conclusive.*

If he intends to reside there an indefinite time, and has no ulterior residence in view, he at once assumes the commercial character of his domicile.<sup>4</sup>

So where he establishes himself for an object that may detain him for an indefinite period.<sup>5</sup>

156. *If one comes to a country with a special object, likely to detain him only for a short time, his residence does not immediately invest him with the commercial character of the place.*<sup>6</sup>

A Scotchman came to reside indefinitely in the United States in 1795, and was naturalized, and in 1807 joined a commercial house in New York, and went to Jamaica in 1808 to attend to the business of his firm there temporarily, and remained for that purpose nearly a year, and in 1811 went thither again for a like purpose, where he was surprised by the war of 1812. He was

<sup>1</sup> 7 Cranch, 542; McConnell v. Hector, 3 Bos. & P. 113; The Matchless, 1 Hagg. Adm. 203.

<sup>2</sup> The Indian Chief, 3 C. Rob. Adm. 12; Willison v. Patteson, 7 Taunt. 438; O'Mealy v. Wilson, 1 Campb. 482.

The subject of domicile is elaborately treated of in 2 Wheat. Appendix.

<sup>3</sup> The Harmony, 2 C. Rob. Adm. 322.

<sup>4</sup> The Venus, 8 Cranch, 253.

<sup>5</sup> The Harmony, 2 C. Rob. Adm.

<sup>6</sup> Ibid.

held to retain the commercial character of his domicile in New York.<sup>1</sup>

157. *Though one may have come to a country originally for a special temporary purpose, yet if the time for accomplishing it becomes protracted and indefinite, he is considered to be domiciled there.*<sup>2</sup>

Sir William Scott says he must take "the compound ratio of time and occupation with a great preponderance on time."<sup>3</sup>

A foreigner who came to New York for his health, and remained there and engaged in trade, was held to have acquired a domicile there.<sup>4</sup>

158. Lord Ellenborough says, that *if a man be entrapped, and detained in a foreign country, this will not confer upon him its national character*; <sup>5</sup> and Lord Loughborough,<sup>6</sup> that, though "the actual place where a man is, is *primâ facie*, to a great many purposes, his domicile, yet you encounter that, if you show that it is either constrained, or, from the necessity of his affairs, transitory; that he is a sojourner." By "necessity of his affairs" cannot be intended that of remaining in order to make profits by entering into commercial enterprises, but that of a temporary stay in order to retrieve his property.

159. *Where a person resident in a foreign country for a special temporary purpose, is surprised there by a war breaking out between his own country and that of his temporary residence, and he loses no time, on the earliest notice that war is declared or impending, to put himself on his way home, the mere fact of his being in the enemy country on the war breaking out will not fix upon him the alien national character.*<sup>7</sup>

This discriminating point of the proposition just stated is, that

<sup>1</sup> The Ann Green, 1 Gall. C. C. 274.

<sup>3</sup> S. C. 2 C. Rob. Adm. 322.

<sup>2</sup> The Harmony, 2 C. Rob. Adm. 322. Sir William Scott gives, as an illustration, the case of a person going to a country to follow a lawsuit, the duration of which is protracted and becomes indefinite. In case of a person coming to a belligerent country at or before the beginning of a war, he says, "it certainly is reasonable not to bind him too soon to an acquired character."

<sup>4</sup> Elbers v. Union Ins. Co. 16 Johns. N. Y. 128.

<sup>5</sup> Bromley v. Hesselstine, 1 Campb. 75.

<sup>6</sup> Bempde v. Johnstone, 3 Ves. jun. 198. See also the Ann Green, *supra*.

<sup>7</sup> Bromley v. Hesselstine, 1 Campb. 75; Bempde v. Johnstone, 3 Ves. jun. 198; The President, 5 C. Rob. Adm. 277.

in such case the residence after the commencement of hostilities is involuntary, or one which the party reluctantly prolongs. We exclude all question as to the national character of any particular parcel of his property on account of its origin, use, destination, or other circumstance than his ownership. The position is, that, under the circumstances stated, his ownership merely, and independently of other considerations, as far as that is the criterion, invests his property with the national character of his country, to which he has at the time, and previously had the *animus reverendi*. This doctrine I take to be reasonable in itself and recognized in the whole course of jurisprudence on the subject. It was much discussed in a case before the Supreme Court of the United States.

Some American merchants residing in England, before hearing of the declaration of war by the United States against Great Britain in 1812, and while they had no particular expectation of it, shipped cargoes thence to the United States, which were captured by American cruisers. Some of these merchants were native British subjects, who had formerly emigrated to the United States, and become naturalized citizens. "It was contended by the captors, that, as these claimants had gained a domicile in Great Britain, and continued to enjoy it up to the time when war was declared, and when these captures were made, they must be considered as British subjects in reference to this property, and, consequently, that it might be legally seized as prize of war, in like manner as if it had belonged to real British subjects. But if not so, it was then insisted, that these claimants, having, after their naturalization in the United States, returned to Great Britain, the country of their birth, and there resettled themselves, they became reintegrated British subjects, and ought to be considered in the same light as if they had never emigrated."

"On the other side, it was argued that American citizens, settled in the country of the enemy, were entitled to a reasonable time to elect, after they knew of the war, to remain there, or to return to the United States, and that, until such election was *bonâ fide* made, the courts of this country were bound to consider them as American citizens, and their property, shipped before they had an opportunity to make this election, as being protected against American capture."<sup>1</sup>

<sup>1</sup> *The Venus*, 8 Cranch, 277.

A majority of the judges were of opinion, "that the doctrine, that a native, or naturalized subject of one country, who is surprised in the country where he was domiciled, by a declaration of war, ought to have time to make his election to continue there or to remove to the country to which he owes a permanent allegiance; and that, until such an election is made, his property ought to be protected from capture by the cruisers of the latter,—is as unfounded in reason and justice as it clearly is in law. The character of the property during war cannot be changed, in transitu, by any act of the party."

Marshall, C. J., dissented. He said, "I think I cannot be mistaken when I say, that, in all views taken of this subject by the most approved writers on the law of nations, the citizen of one country residing in another is not considered as incorporated in that other, but is still considered as belonging to that society of which he was originally a member. And if war break out between the two nations, he is to be permitted, and is expected, to return to his own. But if, while prosecuting his business in a foreign country, he contemplates a return to his own; if, in the prosecution of that business, he is promoting, rather than counteracting, the interests and policy of the country of which he is a member,—it would seem to me to be pressing the principle too far, and to be drawing conclusions which the premises will not warrant, to infer, conclusively, an intention to continue in a country which has become hostile, from a residence and trading in that country while it was friendly."

"The character of his property shipped before a knowledge of the war ought not to be decided absolutely by his residence at the time of the shipment or capture, but ought to depend on his continuing to reside and trade in the enemy's country, or on his taking prompt measures for returning to his own."

He thought that the acts of the party, on his hearing of a declaration of war, are proper and safe evidence of what were his previous intentions; the other judges thought that such evidence could not safely be admitted.<sup>1</sup>

It is to be observed that Chief Justice Marshall does not rely upon the doctrine so strenuously disclaimed by the majority of the court, namely, that a resident in a foreign country is to have

<sup>1</sup> *The Venus*, 8 Cranch, 277.



a reasonable time allowed to him after the commencement of the war to elect his commercial character; he merely says, that it is determined by the motives of the residence, and the intention of the party, before and at the time of the breaking out of the war, gathered from his acts and declarations at the time, and previously, and directly subsequent to that event. In the case in question, the claimants stood upon precisely the same ground as if the voyage had been from China, instead of Great Britain. Looking at the case in this light, the construction put upon the facts by the majority of the court seems to have been very strict upon the claimants. The case is mainly a decision on a rule of evidence, and a construction of circumstances as establishing this or that hypothesis relative to domicile. The better ground on which to support the decision in the particular case seems to be that incidentally suggested in its favor, namely, that the native character easily reverts, and so determines the decision, where there is an equiponderance of evidence between two domiciles.

The consequence apprehended by the other judges from the adoption of Chief Justice Marshall's opinion, namely, that the private property of some subject of the enemy might escape condemnation, does not seem to be worthy of being greatly deprecated, whereas the opposite consequence — the confiscation, by the government, of the property of its own subjects or neutral foreigners, without any fault on their part — is grievous and intolerable. It seems, therefore, to be a case in which the leaning of the court, if it may be supposed that any case admits of such a leaning, is more safe if in favor of the claimant.

Mr. Justice Story says,<sup>1</sup> "that the interest of friends may sometimes be involved in our vengeance upon enemies, is a matter impossible to avoid;" which is a reason for guarding, as much as possible, against a consequence so unjust and so much to be regretted.

In the case of the *Bernon*,<sup>2</sup> Sir William Scott says, "The presumption arising from a man's residence is, that he is there *animo manendi*; it lies on him to explain it."<sup>3</sup>

<sup>1</sup> 1 Gall. C. C. 617.

<sup>2</sup> 1 C. Rob. 102.

<sup>3</sup> See also the case of *The Diana*, 5

C. Rob. 60; and of *The President*, 5

C. Rob. 277, in which latter it is said,

an intention, accompanied by some

160. *Where the residence in the enemy country is voluntarily continued after notice of the war, though for a short time, for commercial purposes, such residence invests the resident with the national commercial character of the place.*

161. *A person having established himself abroad, and acquired a foreign domicile, does not lose his acquired national commercial character by visiting his native country for a merely temporary purpose.<sup>1</sup>*

162. *The mere intention of a person to change his domicile for his native one, or a foreign one, has not that effect until acts are done in its execution.<sup>2</sup>*

163. *If the government treats the inhabitants of a third country, in the occupation of the enemy, as neutral, insurance may be made in their behalf, as was done in Great Britain, in regard to the inhabitants of Hamburg, in 1810, when it was occupied by the French.<sup>3</sup>*

164. *If a man acts as a merchant in two countries, he must be liable to be considered as a subject of each, in respect to the transactions originating respectively in those countries.<sup>4</sup>*

165. *A resident in a colony or a commercial factory established in a foreign country, independent of any control and authority of*

overt act, may rebut the presumption from residence; but whether the act must precede, or may be subsequent to, the declaration of war, is not said; and also *The Ocean*, 5 C. Rob. 90, in which the party, an Englishman, on the appearance of hostilities, being then in France, had taken measures to return to England, but was detained afterwards by the French government; his property was restored to him; and *The Citto*, 3 C. Rob. 38, in which the property of a British subject, who resided in Holland after the declaration of war, for the purpose, as he alleged, of collecting his debts, was condemned by Sir William Scott. Chief Justice Marshall, however, says of Sir William Scott's decisions, "It is impossible to consider them attentively, without perceiving

that his mind leans strongly in favor of the captors." 8 Cranch, 299. See also the case of *Curtissos*, cited 3 C. Rob. 21; and *The Frances*, 8 Cranch, 335.

<sup>1</sup> *The Freundschaft*, 3 Wheat. 14; *Maryatt v. Wilson*, 1 Bos. & P. 438; 8 Term, 31; *The Ann Green*, 1 Gall. C. C. 274; *The Jonge Ruiter*, 1 Act. 116.

<sup>2</sup> *Tabbs v. Bendelack*, 4 Esp. 108.

<sup>3</sup> *Hagedorn v. Bell*, 1 Maule & S. 450. See also *Blackburne v. Thompson*, 3 Campb. 61; 15 East, 81.

<sup>4</sup> *The Jonge Klassini*, 5 C. Rob. 302; *Somerville v. Somerville*, 5 Ves. 787; *The Ann*, 1 Dods. Adm. 221; *The Antonia Johanna*, 1 Wheat. 159; *Elbers v. United Ins. Co.* 16 Johns. N. Y. 128.

*the local government, has the national character of the colony or factory.*<sup>1</sup>

166. *Where a merchant removes from a belligerent country to a neutral one, pending a war, and carries on trade in the latter, his motives will be strictly scrutinized, and if his object appears to be merely to mask his trade for the time, he will be considered as still retaining the national character of the country which he left.*<sup>2</sup>

There is a dictum of Judge Kelsall, Vice-Admiralty Judge in the Bahama Islands, that an emigrant from a belligerent country to a neutral, *flagrante bello*, is conclusively presumed to retain his belligerent character. The same doctrine has been reproduced in the Supreme Court of New York in 1801, and that of the United States in 1817, as if it were a familiar one, and without reference to any authority. The Court of Errors of New York reject it; but also without any citation of authority. Vattel<sup>3</sup> says all citizens of a belligerent country bear the belligerent character wherever they may be. But he intends only those who do not change their citizenship, which he maintains<sup>4</sup> that a citizen has a right to do in certain cases, notwithstanding the wishes or decrees of his government, and in others by permission implied by practice, or expressly given. This doctrine is obviously so reasonable, that I venture to leave it as involved in the common doctrines on the subject of commercial national character, and not an exception.

167. *The national character of a corporation depends upon that of its members.*<sup>5</sup>

It has been held in the Supreme Court of the United States, and that of New York, that a subject of a belligerent country,

<sup>1</sup> The Indian Chief, 3 C. Rob. 22; Cas. N. Y. xxv.; and 2 Johns. Cas. N. Y. 476; The Rachel, The Etrusco, and The Twee Vrienden, id. 29, 31; The Boedes Lust, 5 id. 233; Whitehill's case, cited 5 id. 60. Otherwise, if the local authority has jurisdiction and control. See The San Jose Indiano, 2 Gall. C. C. 268; The Friendschaft, 3 Wheat. 14; The Danous, 4 C. Rob. 255, n.; The Naiade, 4 C. Rob. 251.

<sup>2</sup> See Duguet v. Rhinelander, 1 Johns. Cas. N. Y. 360 (1801); S. C. 1 Caines

<sup>3</sup> B. 3, c. 5.

<sup>4</sup> B. 1, c. 19.

<sup>5</sup> Hope Ins. Co. v. Boardman, 5 Cranch, 57; Bank of U. S. v. Deveaux, 5 Cranch, 62; Society, &c. v. Wheeler, 2 Gall. C. C. 105.

who emigrated to a neutral country during war, did not acquire the national character of the neutral country, by residence, while the war continued.<sup>1</sup> But the Supreme Court of Errors in New York decided, that the emigrant, in such case, if he emigrated *bonâ fide*, and not merely to mask commercial enterprises under a neutral flag, would acquire the national character of the country to which he emigrated, in the same manner as if he had come from a friendly country.<sup>2</sup>

168. *The commercial national character of a consul is not affected by his office, but is determined, like that of other persons, by residence, and the various other circumstances that constitute national character, as affecting that of his property.*<sup>3</sup>

169. *Mariners are considered to be of the nation to which the ships belong, on board of which they are employed.*<sup>4</sup>

170. *The native national character continues until another is acquired.*<sup>5</sup>

171. *The native character easily reverts, and it requires fewer circumstances to constitute domicile in the case of a native than to impress the national character on one who is originally of another country.*<sup>6</sup>

Accordingly, if the party puts himself in itinere to return to his native country, and is in pursuit of his native character, he is deemed already to have resumed it;<sup>7</sup> provided he has been engaged in a trade completely lawful in his native character.<sup>8</sup>

<sup>1</sup> *Duguet v. Rhinelander*, 1 Johns. Cas. N. Y. 360; *Jackson v. New York Ins. Co.* 2 Johns. Cas. N. Y. 191; *The Dos Hermanos*, 2 Wheat. 76.

<sup>2</sup> 1 Caines's Cas. N. Y. xxv.; 2 Johns. Cas. N. Y. 476.

<sup>3</sup> *The Indian Chief*, 3 C. Rob. 12; *Arnold v. United Ins. Co.* 1 Johns. Cas. N. Y. 363.

<sup>4</sup> *The Endraught*, 1 C. Rob. 19; *The Embden*, 1 id. 16; *The Frederick*, 5 id. 9; *The Ann*, 1 Dods. Adm. 221; *The Vriendschap*, 4 C. Rob. 166; *The Indian Chief*, 3 id. 12.

<sup>5</sup> *Sparenburgh v. Bannatyne*, 1 Bos. & P. 163.

<sup>6</sup> *La Virginie*, 5 C. Rob. 98; *The Indiana*, 3 id. 44; *The St. Lawrence*, 1 Gall. C. C. 467; *Sparenburgh v. Bannatyne*, 1 Bos. & P. 163.

<sup>7</sup> *The Frances and Cargo*, 1 Gall. C. C. 616; *The Indian Chief*, 3 C. Rob. 12; *The Ann Green*, 1 Gall. C. C. 274.

<sup>8</sup> *The St. Lawrence*, 1 Gall. C. C. 467; *La Virginie*, 5 C. Rob. 98.



## CHAPTER III.

### INSURABLE INTEREST.

SECT. 1. What interest is sufficient.

2. The legality of the interest.

3. Interest of a mortgager.

4. Interest of a mortgagee.

5. Interest of a lender in bottomry and respondentia.

6. Interest of a borrower in bottomry and respondentia.

7. Interest of a consignee, factor, agent, or carrier.

SECT. 8. Interest in profits.

9. Interest of captors and prize-agents.

10. Interest of the charterer of a ship.

11. Interest in freight.

12. Interest in fishing voyages.

13. Interest in fire insurance.

14. Interest in lives.

15. Interest in double insurance.

16. Interest in reinsurance.

#### SECTION I. WHAT INTEREST IS SUFFICIENT.

172. *It is essential to every contract of insurance, that the assured has an interest at risk.* If he has no interest, or if his interest is not at risk, he can be liable to no loss, and accordingly there is nothing against which the insurer can agree to indemnify him.<sup>1</sup>

173. *It is not requisite, however, that the thing to which the insurance relates, or the interest of the assured, should be a species of property subject to possession or tradition, or that the interest should be that of absolute ownership, or that the subject should be such as to have what is properly called a value or price, or be capable of being assigned.*

One may insure the life or liberty of a freeman, although a freeman cannot be said to have a pecuniary value, nor can another have any directly salable, assignable right of property in his life or liberty. The French Ordinance permitted a person interested in the liberty of a mariner or passenger upon a voyage, to insure him against capture.<sup>2</sup> And it permitted the relatives of a person ransomed from slavery among the Barbary corsairs, and also the

<sup>1</sup> See *Sweeney v. Franklin F. Ins. Co.* 29 Penn. St. 337.

<sup>2</sup> h. t. a. 9.

person who had paid his ransom, to insure his safe return home.<sup>1</sup> The ordinance plainly recognizes an insurable interest in these cases.

A person being insured against the risk of being drafted to serve in the militia, no doubt was suggested that one liable to be so drafted had an insurable interest in that event.<sup>2</sup>

174. But insurance is a contract for pecuniary indemnity ; and, consequently, though neither the thing concerning which the contract is made, nor the interest of the assured, must necessarily have any specific worth, that can be computed in money, or exchanged, yet *the peril or event insured against must be such, that its happening might bring upon the insured a pecuniary loss.*<sup>3</sup> It is sufficient that it might bring a loss, and by no means necessary that it should certainly have that consequence, were it to happen. A creditor has an insurable interest in the life of his debtor, though it is not certain that the debtor would pay him, should he live, yet there is some probability, more or less remote, that he would.<sup>4</sup>

Where goods, being ordered, were consigned to the agent of the consignor to be delivered to the party ordering them, on payment of the price, and were lost in the transit, it was held that the party ordering them could not recover against his underwriters for their value,<sup>5</sup> on the ground that he was not liable for the price, and so had sustained no loss.

175. *In order to constitute an insurable interest against any peril, or render a subject insurable against any peril, it must be such an interest or subject that the peril may have a direct effect upon it, instead of a remote, circuitous, consequential effect.*<sup>6</sup> That is to say, the interest must be a direct one, in reference to the perils insured against.

<sup>1</sup> a. 11, 1 Emer. 203, c. 8, s. 3.

<sup>2</sup> Duffell v. Wilson, 1 Campb. 401 ; Astley v. Ray, 2 Taunt. 214.

<sup>3</sup> Carter v. Humboldt, &c. Ins. Co. 12 Iowa, 287. As to the modification of this statement in life insurance, see Chap. I. and infra, sect. xiv.

<sup>4</sup> See Mr. Justice Lawrence's opinion in Lucena v. Craufurd, 5 Bos. & P. 301, as to insurable interest generally.

<sup>5</sup> Warder v. Horton, 4 Binn. Penn. 529. See The Aurora, 4 C. Rob. 218 ; The Josephine, 4 C. Rob. 25 ; and The Atlas, 3 C. Rob. 299.

<sup>6</sup> See infra, as to the interest of a creditor in the safety of his debtor's property. See also infra, chapter on Risks, section on remote and consequential losses.

176. A *conditional interest is a sufficient subject for insurance*, if it be properly described, that is, such an interest as a party actually has, but which is subject to be defeated by certain events.

An interest subject to the contingency of survivorship between two or more persons, is a common subject of insurance in life policies.

A query was heretofore suggested in Louisiana, whether, under a donation inter vivos according to the civil law, the donee had an insurable interest in the thing so given.<sup>1</sup>

This must evidently depend upon the sort of condition to which the donation is subject, either by law or by its terms. If the condition be such that the gift is valid, and binding on the donor, unless it shall be forfeited by the ingratitude of the donee, during the life of the donor, then the donee has an interest in the thing given, so long as ingratitude cannot be imputed to him. Against his loss by such imputation he has no insurable interest, as it depends on himself.

177. *An assured having possession of a vessel, claiming the same under a purchase at a public sale by a public officer in pursuance of legal proceedings, has an adequate insurable interest*, the sufficiency of which is *not subject to be disputed by his insurers* after a loss, on the ground of the invalidity of the proceedings whereby he acquired his title.<sup>2</sup>

So one having given a bond for the purchase of a vessel, has an insurable interest in its freight.<sup>3</sup>

So one having agreed to sell his vessel for a certain price and make a title, still has an insurable interest.<sup>4</sup>

178. *A purchaser, who is liable for the price of goods, has an insurable interest in them, though the vendor has a lien upon them for the exercise of his right of stopping them in transitu.*<sup>5</sup>

179. *Policies are frequently made in reference to a future interest.* "It is every day's practice to insure goods before they are bought;"<sup>6</sup> yet, if one insures them on his own account, *the*

<sup>1</sup> See Denisart, Collection de Décisions, tome 12; Code Napoleon, Nos. 953-955.

<sup>2</sup> Frierson v. Brenha, 5 La. Ann. 540.

<sup>3</sup> Simmes v. Marine Ins. Co. 2 Cranch, C. C. 618.

<sup>4</sup> Stuart v. Columbian Ins. Co. 2 Cranch, C. C. 442.

<sup>5</sup> See Clay v. Harrison, 1 Lloyd & W. 104, and cases cited in No. 197, note.

<sup>6</sup> Rhind v. Wilkinson, 2 Taunt. 237.

*property must pass to him before a loss happens, otherwise he can recover nothing under the policy.*

Where, before goods are shipped, a bill of lading is made out and signed, and transmitted to the consignee, and he makes advances thereon, his interest attaches as soon as the goods are subsequently laden on board.<sup>1</sup> A policy would accordingly then attach also.

Mr. Ellis<sup>2</sup> cites Lord Chancellor King<sup>3</sup> in support of the proposition, that a fire policy can be made only upon an interest subsisting at the time. Parties do not make either fire or life policies in anticipation of their interest, for the obvious reason, that, as the premiums are usually payable in advance for certain periods, the proportion for the time prior to the interest being acquired would be thrown away. The same would be true on a marine policy on time. But there does not appear to be any reason why a fire policy or life policy cannot be made in anticipation of an interest, as well as a marine policy, where there is no concealment, or fraud, or prejudice to the underwriter. The policy could not, of course, take effect until an interest should accrue.

180. *A valid executory contract for a thing, gives an insurable interest in it* to the party holding the contract, the amount of which will be that of his loss if it is destroyed, or of his gain if the contract is fulfilled. The interest accruing on a contract will be fully illustrated in considering the insurable interest in freight.

So, where the assured had agreed for the purchase of oats to be shipped for him to P., and notice was given him that they were shipped, not specifying to what port, and they were shipped for S. instead of P., and he insured them for S. and P., it was held that the underwriters could not object his want of interest, because the oats had not been shipped to the place designated, for he had a right to accept them, and waive any objection on that account.<sup>4</sup>

So a contract for the purchase of a vessel, and part payment, the legal title and control and right to sell the vessel still remaining with the vendor as security for the payment of the rest of the

<sup>1</sup> Rowley v. Bigelow, 12 Pick. Mass. 307.

<sup>2</sup> Ellis, Ins. 21, ed. 1832.

<sup>3</sup> Lynch v. Dalzell, 4 Brown, Parl. Cas. 431.

<sup>4</sup> Sparkes v. Marshall, 2 Bingh. N. C. 761.



purchase-money, gives the purchaser an insurable interest in the vessel to the amount of her full value, where he is absolutely liable to pay the remainder of the purchase-money.<sup>1</sup>

A decision precisely similar in doctrine was made by the Supreme Court of the United States. One of the two tenants in common of a mill, by both of whom it was insured, had agreed to purchase the other's half on condition of paying a certain amount of outstanding debts, which he had not paid, and was unable to pay, when it was burnt down. The decision was in favor of the assureds for the whole amount insured, on the ground that the underwriters could not object to the want of insurable interest by reason of non-compliance with the condition, since the other co-tenant, and his co-assured, of whom he had purchased, to whom alone it belonged to enforce the condition, had not elected to annul the agreement for the sale on account of such non-compliance.<sup>2</sup>

So, in pursuance of the same doctrine, it was held in New York, that where the assured had agreed to purchase a building, and made a payment of interest on the agreed purchase-money, and had made improvements on the building, he had insurable interest in it to its full value.<sup>3</sup> So one who has bid off property sold under execution,<sup>4</sup> and a vendee with right of possession under a contract for a deed<sup>5</sup> are held to have an insurable interest.

181. *The expected profit on a maritime adventure is an ordinary subject of insurance.*

So the profit of an inn,<sup>6</sup> or a theatre,<sup>7</sup> is a sufficient insurable interest.<sup>8</sup>

<sup>1</sup> Rider v. Ocean Ins. Co. 20 Pick. Mass. 259.

<sup>2</sup> Columbian Ins. Co. v. Lawrence, 1 Pet. 25.

<sup>3</sup> McGinney v. Phoenix Ins. Co. 1 Wend. N. Y. 85. I infer from the report, that the assured was liable for the whole purchase-money notwithstanding the title had not been conveyed to him, and the building had been destroyed; and that the title was retained by the vendor, as security, making the case equivalent to that of a mortgage, where mortgager and mortgagee both have an insurable interest; and if so, the facts of part payment and of improvements

were not requisite in order to give an insurable interest, though the latter would augment the amount of the interest.

<sup>4</sup> Ætna Ins. Co. v. Miers, 5 Sneed, Tenn. 139.

<sup>5</sup> Shotwell v. Jefferson Ins. Co. 5 Bosw. N. Y. 247; Hough v. City F. Ins. Co. 29 Conn. 10. See also Reynolds v. State Ins. Co. 2 Grant, Cas. Penn. 326.

<sup>6</sup> Wright v. Pole, 1 Ad. & E. 621.

<sup>7</sup> Niblo v. North American Ins. Co. 1 Sandf. N. Y. 551.

<sup>8</sup> See beyond, sect. viii.

182. *The share of a seaman in the prospective catchings of a fishing voyage gives him an interest sufficient for insurance, after he has shipped and embarked on the voyage, on which his assignee may make insurance for his own benefit, whether the seaman himself could do so or not.* That is to say, the seaman may insure his share in the catchings after they are on board, but it is matter of query whether he can insure beyond the amount realized, since his share of the prospective catchings is in the nature of wages to be earned. Accordingly, where the ship-owner or other party had shipped a quantity of clothing on board of a sealing vessel, to be supplied to the men on the credit of their pledged shares of the catchings, and insured his shipment and its "proceeds," meaning, by this term, the shares of the men, it was held by Mr. Justice Story, that he thereby had an insurable interest to the full amount at which the subject was valued in the policy, though the amount of goods remaining and the shares of the men in the fruits of the voyage that were on board at the time of the loss, might be less, or might even be nothing, the clothes having been distributed and no seal-skins taken. Judge Story remarked, that the interest did not necessarily cease because, at the moment, there might not be any tangible, corporeal subject.<sup>1</sup>

183. *A mere contingent expectation of a thing, not founded upon any legal right or title to it, or property in it, or upon any contract for it, or any possession of it, liable to be defeated only by some contingency, does not give an insurable interest in the thing, which will be covered by an insurance upon it.*

An expectation may, in many cases, be insured, against certain risks, by a policy particularly specifying its nature.

A mere verbal promise which is not legally binding does not give an insurable interest in the thing promised.<sup>2</sup>

Nor does a contract which has been forfeited by non-compliance with its conditions give such an interest in the thing contracted for.<sup>3</sup>

An expectation of a fishing bounty from government, encouraged merely by some instances of the bounty being given, but

<sup>1</sup> *Hancox v. Fishing Ins. Co.* 3 Sumn. C. C. 132.

<sup>2</sup> *Stockdale v. Dunlop*, 6 Mees. & W. Exch. 224.

<sup>3</sup> *Brown v. Williams*, 28 Me. 252.

not founded on any promise of the government, does not give such an interest.<sup>1</sup>

184. *Retrospective insurance is matter of common practice, when neither of the parties is supposed to know whether a loss has happened, and is provided for in the printed form of marine insurance by the clause, "lost or not lost;" so that the policy may be thus applied to a subject which has ceased to exist at the time of making it.*

185. *It is plain that there must be a subsisting interest at the time of the loss, in order to give any claim against underwriters for indemnity.*<sup>2</sup>

186. *A party having agreed to assume certain risks, or stand insurer on a subject, has an insurable interest in it against the risks for which he is himself liable.*<sup>3</sup> The interest in such case is identical with that for reinsurance.

187. *A change of an absolute ownership, to an interest as mortgagee, or other interest not required to be specifically described in the policy, does not defeat a policy on the subject, which does not specify the kind of interest that is insured.*<sup>4</sup>

188. *So, where the owner has sold the subject, agreeing still to stand insurer in respect to certain risks, for a certain period, under his then subsisting policy, this constitutes a sufficient still subsisting interest under such policy.*

Thus, where a member of a mutual marine insurance association, formed for the purpose of insuring ships, sold his ship on which he was insured by the association, but agreed with the purchaser, that, in case of her being lost on a certain voyage or within a certain time, specifying the risk for which she had been

<sup>1</sup> *Deveaux v. Steele*, 6 Bingham. N. C. 358. *Valton v. National Ass. Co.* 20 N. Y. 32; *Rawls v. American L. Ins. Co.* 27

<sup>2</sup> *Carroll v. Boston Mar. Ins. Co.* 8 N. Y. 282.

*Mass.* 515; *Copeland v. Mercantile Ins. Co.* 6 Pick. *Mass.* 198; *Murdock v. Chenango County Ins. Co.* 2 N. Y. 210; *Barr v. Gibson*, 5 Mees. & W. Exch. 390; *Howard v. Albany Ins. Co.* 3 Den. N. Y. 301; *Wilson v. Trumbull, &c. Ins. Co.* 19 Penn. St. 372; *Peabody v. Washington Ins. Co.* 20 Barb. N. Y. 339; *Birdsey v. City F. Ins. Co.* 26 Conn. 165; contra in life insurance,

<sup>3</sup> *Reed v. Cole*, 3 Burr. 1512. As the obligor in a bond to dissolve an attachment of a vessel. *Fireman's Ins. Co. v. Powell*, 13 B. Monr. Ky. 311.

<sup>4</sup> *Stetson v. Mass. Mut. Fire Ins. Co.* 4 Mass. 330; *Reed v. Cole*, 3 Burr. 1512. See *Bell v. Firemen's Ins. Co.* 3 Rob. La. 428, contra, but the doctrine in the text is asserted S. C. 5 id. 423.

insured, he would pay the purchaser five hundred pounds, the vendor still had an insurable interest in the ship to that amount in respect to such risk under the policy.<sup>1</sup>

189. *Where the assured has agreed to sell the subject, deliverable on payment of the price, or puts it into the vendee's hands, the property to pass on payment, he still retains an insurable interest to its full value.*<sup>2</sup>

190. *Though the interest of the assured is subject to be defeated by the fraudulent act of another, still it is a sufficient subject for insurance, and he will recover for a loss, unless he has been divested of his interest before the loss takes place.*

As where the interest is a mortgage, or other lien, which, to be valid against a subsequent purchaser without notice, requires to be recorded or other publicity to be given to it.<sup>3</sup>

191. *A bailee, or depositary, being liable by law or by contract for certain risks wherety the subjects bailed or deposited may be damaged or lost, has an insurable interest in it in respect to such risks.* This follows from the preceding propositions.<sup>4</sup>

192. *It is a general rule that a trustee or agent for the sale of a ship, or other subject, cannot himself become the purchaser, without the consent or ratification of his principal or cestui que trust, and his assuming to be absolute owner will not divest the principal or cestui que trust of his property or insurable interest.*

Thus, where the master and supercargo, being authorized to make sale of a vessel, agreed between themselves that one of them should be the purchaser and absolute owner, this agreement was held not to divest the owners of their insurable interest.<sup>5</sup>

So if, upon some disaster, the cargo is put up to sale and bought by the master, he obtains no interest by such purchase except by the shipper's consent, and the property will still belong

<sup>1</sup> Reed v. Cole, 3 Burr. 1512.

<sup>2</sup> Warder v. Horton, 4 Binn. Penn. 529; Bell v. Fireman's Ins. Co. 3 Rob. La. 428; Providence County Bank v. Benson, 24 Pick. Mass. 204; Williams v. Ins. Co. of N. America, 1 Hilt. N. Y. 345.

<sup>3</sup> Bell v. Western Mar. & Fire Ins. Co. 5 Rob. La. 423.

<sup>4</sup> See Crowley v. Cohen, 3 Barnw. & Ad. 478. Implied also in Armitage v. Winterbottom, 1 Mann. & G. 130; wharfingers and warehousemen come within this rule; Waters v. Monarch Ass. Co. 5 Ell. & B. 870, 34 Eng. L. & Eq. 116.

<sup>5</sup> Copeland v. Mercantile Ins. Co. 6 Pick. Mass. 198.



to the shipper, who will continue to retain his insurable interest.<sup>1</sup>

193. *The attachment or arrest of goods or other subject at the suit of a creditor on mesne process, or a seizure on execution to satisfy a judgment, does not deprive the owner of his interest or diminish it, until a legal absolute sale is made.*<sup>2</sup>

194. *The illegal capture of a subject, and the purchase of it by the captor at a sale under condemnation in a foreign court, will not divest the owner of his property, nor, consequently, of his insurable interest.*<sup>3</sup>

195. *Where property is forfeited to the government by some illegal act, but still remains in possession of the owner as his, and is not illegally employed or exposed to illegal risks in the adventure upon which an insurance is made, the owner still continues to have sufficient insurable interest,*<sup>4</sup> *but from the time of the seizure for the forfeiture his insurable interest ceases, in case the proceedings are thereupon prosecuted to final condemnation.*

In some cases a distinction has been taken between a violation of law, whereby the thing alone is forfeited, and one whereby the thing or its value is so; the forfeiture of the thing being considered as divesting the owner of his property simultaneously with the illegal act:<sup>5</sup> but in case of the forfeiture of its value merely, the property being considered not to be divested until the seizure of the thing for the forfeiture.<sup>6</sup>

When a seizure is made for forfeiture by breach of law, it necessarily operates retroactively, and overrides all mean conveyances and liens;<sup>7</sup> but the established doctrine is, that, in general, without any such distinction as above stated, the owner is not divested of his property by an act of forfeiture until seizure there-

<sup>1</sup> *Barker v. Marine Ins. Co.* 2 Mas. C. C. 369.

<sup>2</sup> *Franklin Ins. Co. v. Findlay*, 6 Whart. Penn. 483; *Bell v. Western Mar. & Fire Ins. Co.* 5 Rob. La. 423; 3 id. 428.

<sup>3</sup> *The Arrogante Barcelones*, 7 Wheat. 496. See also *Santa Maria*, 7 Wheat. 490; *The Santissima Trinidad*, 7 Wheat. 233; *The Gran Para*, 7 Wheat. 471; 6 Wheat. 16, n.; *The Bello Corrunes*, 6 Wheat. 152.

<sup>4</sup> *Wilkes v. People's Ins. Co.* 19 N. Y. 184.

<sup>5</sup> *Fontaine v. Phoenix Ins. Co.* 10 Johns. N. Y. 58.

<sup>6</sup> *United States v. Grundy*, 3 Cranch, 337.

<sup>7</sup> *Gelston v. Hoyt*, 3 Wheat. 246. See also *United States v. 1960 Bags of Coffee*, 8 Cranch, 398; *The Mars*, 8 Cranch, 417.

for,<sup>1</sup> that is to say, after the act of forfeiture the owner holds a precarious title, subject to be divested, and coming within the doctrine above laid down as to conditional interests.<sup>2</sup>

In a case of insurance, where the underwriters alleged in defence a forfeiture of the insured vessel, by an act of smuggling, for which no seizure had been made, Mr. Justice Story said: "I have long been accustomed to lay up as an elementary axiom, that, in all cases of forfeiture of personal chattels, the property of the owner is not divested until there is an actual seizure thereof by, or for the use of, the government."<sup>3</sup>

196. *Where the property in a thing is conditional, and subject to a contingency whereby it may be defeated and extinguished, the question occurs, whether the assured can, after the happening of the contingency, and being divested of his title, recover for a loss that occurred after the act of forfeiture.*

This case has not, to my knowledge, occurred in jurisprudence. It may be objected to the assured's recovering the loss in such case, that it would be thus far screening him from the consequences of a contravention of the law. But to this it may be answered, that denying to him the indemnity for an intermediate loss would be aggravating or positively adding to the penalty, for the right of the government to the forfeited thing attaches to it only in the state in which it is at the time of the seizure, without regard to the diminution of its value after the act of forfeiture by wear and tear, decay, the action of the elements, or the negligence and mismanagement of the owner. As between the assured and the insurer, the rights of the government prior to the seizure are res inter alios. It is a matter of mere chance whether the value of the thing may be increased or diminished subsequently to the act of forfeiture and before the seizure. The owner may have replaced the damage by repairs, and may have increased its value

<sup>1</sup> *Pipon v. Cope*, 1 Campb. 434. See also *Williams v. Despard*, 5 Term, 112; where *Thomas v. Withers* is cited by Gould, J., and *Hennel v. Perry* by Lord Mansfield, to the same point. See also *United States v. The Anthony Mangin*, 3 Cranch, 356, n.; S. C. 7 Pet. Adm. 452, per Winchester, J., an elaborate case.

<sup>2</sup> *Supra*, sub. sec. No. 176.

<sup>3</sup> *Clark v. Protection Ins. Co.* 1 Stor. C. C. 109; and see *Lockyer v. Offley*, 1 Term, 252; *Polleys v. Ocean Ins. Co.* 14 Me. 141; *Ocean Ins. Co. v. Polleys*, 13 Pet. 157; and *Mariatigui v. La. State Ins. Co.* 8 La. 63.

by improvements and additions. The denying him indemnity on account of circumstances occurring after the loss would be contrary to the general principles of jurisprudence in this respect relative to insurance. It would be equivalent to the decision of Lord Ellenborough in denying indemnity for sea-damage, which was insured against, because a total loss subsequently happened by a seizure, which was not insured against. I therefore venture to state, as law, that

*A loss, before seizure for forfeiture, is recoverable after seizure.*

197. The preceding case is not precisely equivalent to that of loss before stoppage in transitu. It has been decided in one case that a stoppage in transitu annulled the sale ab initio, and consequently, in such case, it would divest the consignee of all insurable interest to which the policy could apply.<sup>1</sup> But the decision was put upon the circumstances of that case, and does not profess to adopt a general doctrine to that effect, for the general, well-established doctrine on the subject is, that, where goods ordered are once delivered to the carrier, so as to render the party who ordered them liable for the price, he is not discharged from his liability by their being stopped in transitu by reason of his insolvency or refusal to pay on the arrival of the goods, if so agreed. In such case the vendor exercises a right, which is secured by a lien, and is accountable for the proceeds of the goods.

*The vendee, therefore, evidently, has an insurable interest in the goods to their full value, after, as well as before, they are stopped in transitu*; and, in the adjustment of a salvage loss or constructive total loss, is accountable to his underwriters for the salvage that goes to diminish the amount for which he is liable to the vendor, in deduction for the loss under his insurance.<sup>2</sup>

<sup>1</sup> *Clay v. Harrison*, 1 Lloyd & W. 104.

<sup>2</sup> This doctrine is distinctly and ably laid down in the note to the above case of *Clay v. Harrison* by the reporters, and the positions taken by the court respecting the effect of the stoppage in transitu in annulling the contract of sale ab initio, is questioned and shown to be erroneous in the particular case. The stoppage of the goods in transitu by the vendor cannot operate as a revendica-

tion without the consent of the vendee. See *Kymer v. Suwereropp*, 1 Campb. 109; and other authorities cited by counsel in the above case of *Clay v. Harrison*. See also *Newhall v. Vargas*, 15 Me. 93, and cases cited. Story, Sales, c. 11, s. 320, and 2 Kent's Com. Lect. 39, s. 11, p. 551 of 6th ed. 1848; *Stanton v. Eager*, 16 Pick. Mass. 467; *Jordan v. James*, 5 Ohio, 88; *Feise v. Wray*, 3 East, 93.

198. *The law seeks to protect the owner against the loss of his property, and with it his insurable interest, in consequence of a forfeiture by the act of a party into whose possession it has come without his authority or consent.*

Where property illegally captured is recaptured, and the recaptor commits an act of smuggling, it has been held not to be thereby forfeited.<sup>1</sup>

199. *In regard to the requisites to a change of interest in an enemy's ship, Lord Eldon says: "If a ship be taken by hostile force, the title to that ship, as against foreigners, cannot be changed by any act of local legislation, but the ship must be condemned in a court proceeding according to the law of nations, on rules binding, not only on subjects of the country where the court is held, but on foreigners who are not so;"*<sup>2</sup> and the insurable interest of the owner will accordingly continue notwithstanding a condemnation by an incompetent tribunal.

200. *A consul can have no judicial jurisdiction in any country, except what is authorized by the government of such country; and his decrees will, therefore, affect the insurable interest in any property only as far as his jurisdiction is so authorized.*

It has been a practice of the French government, since 1793, to grant commissions to its consuls in foreign countries to hold prize courts.<sup>3</sup> A question has been made, whether the title to a ship, acquired by a condemnation and sale under a decree of one of these tribunals, gave to the purchaser an insurable interest. A Dutch vessel was condemned at Bergen, in Norway, by the French consul there, and purchased under that decree by a Danish subject, who sold her to the assured. A loss happening, his interest was disputed. Lord Kenyon said to the jury, that "the sentence of a French court, in a country out of the jurisdiction of France, had been wisely held not to change the property; but where it had been acquiesced in, in that country, it might make a difference."<sup>4</sup> The French writers are of opinion, that these courts are not legal, unless their establishment is acquiesced in and sanctioned by the government of the country

<sup>1</sup> The *Bello Corrunes*, 6 Wheat. 152. years without condemnation is held not to change the property.

<sup>2</sup> *Lucena v. Craufurd*, 5 Bos. & P.

<sup>3</sup> *Robinson's Col. Mar.* 32, n.

319. See also ——— *v. Sands*, 10 Mod.

<sup>4</sup> *Smith v. Surridge*, 4 Esp. 25.

79, where possession by captors four



in which they are established; and, accordingly, unless they are so sanctioned, their decrees have no force whatever in changing the title of the property condemned by them.<sup>1</sup>

It has been laid down, that consent by treaty is requisite to the establishment of any such foreign consular court in the United States.<sup>2</sup>

201. *A creditor, merely, as such, has no insurable interest in the property of his debtor.*<sup>3</sup>

202. *Advances for repairs of a ship give no insurable interest in it, unless when secured by a lien by law or contract.*<sup>4</sup>

Where money was advanced to the master of a ship to pay for repairs in Canada, and he drew a bill on his owners in London for the amount, with orders, in case it should be dishonored, to insure the ship, it was held that this did not give to the holder of the bill an insurable interest in the vessel,<sup>5</sup> though the payee recovered against the master the amount of the premium paid for the insurance.

203. *Where the proceeds of goods shipped to a foreign port are payable to a creditor of the shipper, he has an insurable interest in respect to the risks of the voyage, which, however, ought to be specially described in the policy, unless the goods are consigned to him or his agent.*<sup>6</sup>

<sup>1</sup> Opinion of M. Portalis, cited 6 Wheat. 156.

<sup>2</sup> Glass v. Sloop Betsey, 3 Dall. Penn. 16. See cases infra, titles Evidence, Judgment.

<sup>3</sup> But one having a statutory right to sell the real estate to pay his debt, has such an interest. *Herkimer v. Rice*, 27 N. Y. 163.

<sup>4</sup> *Buchanan v. Ocean Ins. Co.* 6 Cow. N. Y. 318.

<sup>5</sup> *Tasker v. Scott*, 6 Taunt. 234; 1 Marsh. 556.

<sup>6</sup> See *Aldrich v. Equitable Safety Ins. Co.* 1 Woodb. & M. C. C. 272. In *Palmer v. Pratt*, 2 Bingham. 185, the decision is against the assured in a policy intended to cover such an interest, but the interest was not properly stated in the

policy. The case was one of advances made in London to the master of an East India vessel to purchase goods for his adventure, the consignee in India being ordered to pay the proceeds over to the agent of the lender, for whose security insurance was to be made. This was a form of contract which had prevailed for some ten or twelve years instead of respondentia. In giving opinions on a policy intended to cover the interest of the lender, Park, J., considered it to be "the duty of the court to restrain these novelties;" and Burrough, J., was opposed to introducing "new modes of expression into policies of insurance." These are certainly very objectionable considerations to influence a judicial decision.

204. It is a familiar doctrine, that *a party*,<sup>1</sup> *having a lien on a vessel or cargo under a contract for advances*, may be rightfully considered as the special owner of them to the extent of those advances, and, as such, *may protect himself by insurance; and that a creditor, to whom goods are assigned as collateral security, has an insurable interest in them to the amount of his debt.*<sup>2</sup>

205. *The party insured has an insurable interest in the solvency of his underwriters*, since they are conditionally responsible to him.<sup>3</sup>

206. *An insurance to the full value does not exhaust the insurable interest of the assured*, unless the policy contains the clause relating to prior insurance, nor even then, *for he can*, notwithstanding, *make double insurance* in simultaneous policies,<sup>4</sup> which is in effect a mere insurance of the solvency of each set of underwriters, by the policies of the others, for he can recover but one indemnity from all.

207. *So, if insurance is made against certain risks, the assured still has an insurable interest to the full value against other risks.*

208. *A partner, equally interested with his copartner, and largely in advance to the partnership concern, has an insurable interest in the whole stock to its full value.*

It is held in Louisiana that he may insure it to its full value in his own name, and on his own account.<sup>5</sup>

And in Massachusetts, that he may so insure a building built with partnership funds, on the land of his copartner.<sup>6</sup>

## SECTION II. THE LEGALITY OF THE INTEREST.

209. *The insurable interest in property may be extinguished by a prohibition of insurance upon it.*<sup>7</sup>

<sup>1</sup> *Seamans v. Loring*, 1 Mas. C. C. 127.

<sup>2</sup> *Wells v. Philadelphia Ins. Co.* 9 Serg. & R. Penn. 103, and s. 4, 5, 7, 9, *infra*.

<sup>3</sup> *Emerigon*, tom. 1, c. 1, s. 2.

<sup>4</sup> *Wiggin v. Suffolk Ins. Co.* 18 Pick. Mass. 145.

<sup>5</sup> *Millaudon v. Atlantic Ins. Co.* 8 La. 557.

<sup>6</sup> *Converse v. Citizens Ins. Co.* 10 Cush. Mass. 37.

<sup>7</sup> As on births and christenings, 6 Geo. I. c. 18; price of public stocks, 7 Geo. II. c. 18, s. 4; the slave-trade, 47 Geo. III. c. 36; the codes of other European States prohibit insurance in divers cases.

210. *So insurance upon a subject is void if the interest insured is illegal, or if the contract contemplates an unlawful use of it.*<sup>1</sup>

Thus, a policy on a cargo imported from a foreign port, with which intercourse is prohibited by the law of the place where the insurance is effected, is void.<sup>2</sup>

If the trade be illegal, it defeats the policy on the ship, as well as that on the cargo.<sup>3</sup>

Ships or goods destined in contravention of the monopoly granted by law to the British East India or South Sea Company, cannot be effectually insured in England.<sup>4</sup>

So insurance on a ship not manned in conformity to the navigation laws of the place where the policy is made, and where she belongs, has been held to be void.<sup>5</sup>

This decision is, however, a very stringent application of the doctrine in question, since the illegality is not in the contract nor in the property or the use of it, but in an incidental collateral delinquency for which the law itself prescribes the forfeiture,<sup>6</sup> and which may be classed with the exceptions specified below.

Before the prohibition of the slave-trade by a British statute,<sup>7</sup> it was required, that the captain of a slave-ship should have a certain description of certificate. It was held that, by the want of such certificate on the part of the captain employed, a voyage was rendered illegal.<sup>8</sup>

So a policy on a voyage in violation of an embargo, laid by the government of the country to which the owner of the property belongs, is void.<sup>9</sup>

In like manner, insurance was defeated by an evasion of the act of Parliament requiring vessels to sail with convoy.<sup>10</sup>

<sup>1</sup> Redmond v. Smith, 7 Mann. & G. 457.

<sup>2</sup> The United States v. The Paul Shearman, 1 Pet. 98.

<sup>3</sup> Gray v. Sims, 3 Wash. C. C. 276.

<sup>4</sup> Camden v. Anderson, 5 Term, 709; 1 Bos. & P. 272; Morck v. Abel, 3 Bos. & P. 35; Chalmers v. Bell, 3 Bos. & P. 604; Dunlop v. Gill, 1 Barnew. & Ald. 334; Jacob v. J'Ansen, 3 Taunt. 534; Wilkinson v. Londonsack, 3 Maule & S. 117.

<sup>5</sup> Suart v. Powell, 1 Barnew. & Ad. 266.

<sup>6</sup> See Deshon v. Merchant's Ins. Co. 11 Mete. Mass. 199.

<sup>7</sup> 31 Geo. III. c. 54, s. 2.

<sup>8</sup> Farmer v. Legg, 7 Term, 186.

<sup>9</sup> Dalmada v. Motteux, Park, 357.

<sup>10</sup> Ingham v. Agnew, 15 East, 517; Wainhouse v. Cowie, 4 Taunt. 178; Darby v. Newton, 6 Taunt. 544; Wake v. Atty, 4 Taunt. 493. See Metcalf v. Parry, 4 Campb. 123; Carstairs v. All-

Where, in pursuance of law, a bond was given conditioned to employ a cargo in trade on the coast of Africa, it was held that, by the forfeiture of the bond, the insurance on the cargo was defeated.<sup>1</sup>

Where the parties being citizens of the United States stipulated against any exception "on account of ports interdicted by the laws of the United States," and the ship was destined to such a port, the policy was thereby made void.<sup>2</sup>

211. *Though there is no express prohibition in respect to a subject, still, if insurance upon it is contrary to the spirit and general principles, or what is called "the policy" of the law, the owner cannot make a valid insurance upon it.*<sup>3</sup>

Thus, an assured cannot be protected by insurance against loss and damage by his own crimes, frauds, and misconduct.

Upon the same ground, *wagering policies have been held void* by some courts. Mr. C. J. Dana, of Massachusetts, says: "As wager policies are injurious to the morals of the citizens, and tend to encourage an extravagant and peculiarly hazardous species of gaming, they ought not to receive the countenance of this court."<sup>4</sup> "They are," says Chief Justice Parker, "against the policy of our laws."<sup>5</sup> And they are held to be illegal in Pennsylvania.<sup>6</sup>

Such insurances were, however, considered to be legal in New York,<sup>7</sup> before the prohibition of them by the Revised Statutes of that State.

In England a wagering policy is not considered to be, by its essential character as a wager, so injurious to morals and inconsistent with the public interest, as to be void at the common law

nutt, 3 Campb. 497; Henderson v. Hind, 1 Taunt. 250.

<sup>1</sup> Gibson v. Service, 5 Taunt. 433; S. C. 1 Marsh. 119.

<sup>2</sup> Russell v. Degrand, 15 Mass. 35.

<sup>3</sup> Mount v. Waite, 7 Johns. N. Y. 434; Jones v. Randall, Cowp. 37; Lofft, 383; Carter v. Boehm, 3 Burr. 1905; S. C. 1 W. Blackst. 593; Da Costa v. Jones, Weskett, tit. Wager, a. 3; S. C. Cowp. 729; Roebuck v. Hammerton, Cowp. 737.

<sup>4</sup> Amory v. Gilman, 2 Mass. 1. See also Stetson v. Mass. Mut. Fire Ins. Co. 4 Mass. 330.

<sup>5</sup> Lord v. Dall, 12 Mass. 115. See also Hoit v. Hodge, 6 N. H. 104, and Collamore v. Day, 2 Vt. 144.

<sup>6</sup> Pritchett v. Ins. Co. of North America, 3 Yeates, Penn. 461.

<sup>7</sup> Clendening v. Church, 3 Caines, N. Y. 141; Juhel v. Church, 2 Johns. Cas. N. Y. 333.



independent of the statute.<sup>1</sup> Yet the chancellor required proof of interest, in one case, on a policy, which was a wagering one in form.<sup>2</sup>

If the wager, whether by a policy or otherwise, creates a bias in the discharge of a public duty, or is otherwise against the policy of the laws and the public interest, it is void at the common law.<sup>3</sup> And it was probably upon this ground that Lord Mansfield said, "Though every man had an interest in the events of war and peace, yet he doubted whether that was an insurable interest."<sup>4</sup>

A policy made in New York upon a ticket in a lottery out of that State, was held to be illegal, on the ground that a contract is void "if it be against the principles of public policy, equally as if it contravened a positive law;" and insurance on the tickets of lotteries within the State was prohibited by a statute, the reasons of which, as alleged in the statute, were, that such insurances are against public policy, and of an immoral tendency; and the court say, the reasons of the act extend to all insurances of lottery tickets, though not comprehended in its express provisions.<sup>5</sup>

212. *The wages of mariners are universally considered not to be insurable by the mariners themselves; not on account of the insufficiency of the interest and risk, but lest their motives to exertion for the safety of the ship and cargo should be diminished.*<sup>6</sup>

*The mate's wages are not insurable, nor is any privilege he may have in the vessel instead of wages. But he may insure his property on board,*<sup>7</sup> though bought with the money received as wages.<sup>8</sup>

<sup>1</sup> 19 Geo. II. c. 37, s. 1; *Da Costa v. Firth*, 4 Burr. 1966; *Dean v. Dicker*, 2 Strange, 1250; *Thelluson v. Fletcher*, Dougl. 301; *Goddart v. Garrett*, 2 Vern. 269; *Wittingham v. Thornborough*, Prec. in Chanc. 20; *Weskett*, tit. Lives, n. 7; *Good v. Elliott*, 5 Term, 693; *Assievedo v. Cambridge*, 10 Mod. 77; *De Paiba v. Ludlow*, 1 Com. 361.

<sup>2</sup> *Le Pyre v. Farr*, 2 Vern. 716.

<sup>3</sup> *Allen v. Hearne*, 1 Term, 56; *Atherford v. Beard*, 2 Term, 610.

<sup>4</sup> *Mollison v. Staples*, Park, 640, n. See also *Wharton v. De la Rive*, Park, 573; *Marshall*, 642, n.

<sup>5</sup> *Mount v. Waite*, 7 Johns. N. Y. 434.

<sup>6</sup> 1 Emer. 235, c. 8, s. 10; *Lucena v. Craufurd*, 5 Bos. & P. 294; *Weskett*, tit. Wages; *The Juliana*, 2 Dods. Adm. 509; *The Lady Durham*, 3 Hagg. Adm. 201; *The Neptune*, 1 id. 227.

<sup>7</sup> *Webster v. De Tastet*, 7 Term, 157.

<sup>8</sup> 1 Magens, 18.

A mariner having a privilege of carrying a certain quantity of goods, may insure the goods, for it is the freight, and not the goods themselves, that constitutes a part of his wages.<sup>1</sup>

213. *The captain may insure his wages, commissions, or privilege on board of the vessel, as he is presumed to be a man of more trust than a sailor.*<sup>2</sup>

214. *It is a general principle of law, that, if a contract be intended to indemnify the owner for loss on property by reason of its being implicated in an illegal trade, or applied to an illegal use, or which, according to the laws of the country where the contract is made, it is criminal for the owner to hold, such contract is void; and accordingly, the owner has no legally insurable interest.*<sup>3</sup>

215. *An act subject by law to a penalty, though not prohibited in direct terms, is illegal.*<sup>4</sup>

216. *A treaty made by competent authority, has the force of law in respect to the subjects of the contracting governments.*<sup>5</sup>

217. *If a contract admits of a legal performance, though its terms are such as to admit of being applied to what is not so, a legal intent is presumed, or at least may be proved :*

As where the destination is described to be to ports on a coast generally, and some of them are lawful, and others unlawful, the destination is presumed,<sup>6</sup> or at least may be shown, to be to the lawful ports.<sup>7</sup>

<sup>1</sup> Galloway v. Morris, 3 Yeates, Penn. 445.

<sup>2</sup> King v. Glover, 5 Bos. & P. 206; Foster v. Hoyt, 2 Johns. Cas. N. Y. 327. Primage is insurable. Pedrick v. Fisher, Sprague, Dec. Dist. Ct. 565.

<sup>3</sup> Armstrong v. Toler, 11 Wheat. 258, and authorities there cited; Patton v. Nicholson, 3 Wheat. 204; Bartle v. Colman, 4 Pet. 184; 1 Greenleaf, Ev. s. 281, and cases there cited; Chitty, Contracts, 519-527.

<sup>4</sup> De Begnis v. Armistead, 10 Bingh. 107; Drury v. De Fontaine, 1 Taunt. 131; Gallina v. Laborie, 5 Term, 242; Ribbans v. Crickett, 1 Bos. & P. 264; Blackford v. Preston, 8 Term, 89; Law v. Hodson, 2 Campb. 147; S. C. 11 East, 300; Per Story, J., in Clark v. Protection Ins. Co. 1 Stor. C. C. 109.

<sup>5</sup> The Neutralitet, 3 C. Rob. 295; The Eenrom, 2 id. 1; 1 Arnould, Mar. Insurance, pp. 714, 715, c. 5, s. 2, a. 2. Lord Mansfield seems to have regarded the commercial stipulations by treaty, as standing upon the same footing as the revenue laws of foreign countries, and not binding upon the parties to a policy. Lever v. Flecher, 1 Park, Ins. 8th ed. 507; S. C. Marshall, Ins. 2d ed. 61.

<sup>6</sup> Anon. 1 Chitt. 49.

<sup>7</sup> Anon. 1 Chitt. 49; Gill v. Dunlop, 7 Taunt. 193; Muller v. Thompson, 2 Campb. 610; Wright v. Welbie, 1 Chitt. 49; Jeremy's Index, 1819, p. 74; Holland v. Hall, 1 Barnew. & Ald. 53; Haines v. Busk, 5 Taunt. 521; Thornton v. Lance, 4 Campb. 231; 1 Greenleaf, Ev. ss. 34, 35, 80, 81.

218. *Where a risk, legal in its commencement, becomes illegal by some subsequent law, the acts of the assured in prosecuting it will not be illegal, and his interest in the subject in respect to such acts will not cease to be insurable until he has notice of the law, or it is so promulgated that he is presumed to have such notice.*<sup>1</sup>

219. *Where any material part of an integral contract is illegal, the whole is thereby tainted and void.*<sup>2</sup>

220. *A mere intent not acted upon or agreed upon, is not a subject of judicial cognizance, either civilly or as a crime.*

Mr. Justice Story says: "A mere intention to do an illegal act, or other act which would avoid a policy, if done, but which has never been consummated by any act, has never, as far as I know, been deemed per se to vitiate the policy."<sup>3</sup> This was said in reference to a case where no illegality of the subject-matter, or of any stipulation, appeared on the face of the policy.<sup>4</sup>

Sir William Scott says, that, in order to furnish ground for the condemnation of property, "there must be an act of trading to the enemy country, as well as an intention. No case has been produced in which the mere intention to trade to an enemy's country has enured to condemnation." And though the voyage

<sup>1</sup> *Walden v. Phoenix Ins. Co.* 5 Johns. N. Y. 310. It was a case of the prosecution of the adventure after the embargo act of 1807 was passed. The case involves the question, what is a promulgation of a law to make it binding, and the doctrine assumed is, that the assured was not affected until he had notice, or must be presumed to have had notice of it from the fact of its passage in New York where he resided, in which port the vessel was seized when putting out to sea. This is obviously equitable, and is within the principle of a provision of the Constitution, since to subject one to punishment for violating a law where it could not possibly be known, is to give it, practically, an ex post facto operation. See 3 Story, Com. on Const. § 1340, and cases there cited contra.

<sup>2</sup> *Bird v. Pigou*, 2 Selwyn, N. P. 991,

n., London ed., 1831, 994, n. per Lord Kenyon; *Camden v. Anderson*, 5 Term, 709; 1 Bos. & P. 272. The inquiry as to what illegality will defeat a contract, and what will be considered to be merely collateral and incidental, is an extensive subject common to insurance and other contracts. For authorities on the subject of the illegality of contracts, see Chitty, Contracts, 3d London ed. reprinted at Springfield, 1842, pp. 697, 698; also *Armstrong v. Toler*, 11 Wheat. 258; *Patton v. Nicholson*, 3 Wheat. 204, and cases there cited; *Ex'rs of Cambioso v. Assignees of Maffitt*, 2 Wash. C. C. 98; *Bensley v. Bignold*, 5 Barnew. & Ald. 335; 2 Greenleaf, Ev. s. 402.

<sup>3</sup> *Clark v. Protection Ins. Co.* 1 Stor. C. C. 124.

<sup>4</sup> And see *Waters v. Allen*, 5 Hill, N. Y. 421.

was towards a colony supposed by the party to belong to the enemy, but which had been captured by his own nation before the arrival of the ship, it was held not to be a trading to the enemy country.<sup>1</sup>

“Where the country is known to be hostile,” says the same judge, “a commencement of a voyage towards that country may be a sufficient act of illegality; but where the voyage is undertaken without that knowledge, the subsequent event of hostility will have no such effect.”<sup>2</sup>

It was held by the English Court of King’s Bench, that, if a cargo be taken to be delivered at a port where its delivery is illegal by the laws of the place where the policy is made, the taking of the cargo on board and transporting it is illegal, and the policy upon the cargo for the voyage is void,<sup>3</sup> for the commencement of the voyage is an act done in execution of the illegal intent.

221. *A contravention of law, though it have relation to the subject or the risk, still will not affect the insurance if it be remote and distinct from the contract, or only collateral and concomitant with it, or incidental, or merely precedent or subsequent, and not constituting a part of it or embracing and imbuing its stipulations.*

Thus it is not a good objection against an insurance on goods, that they were purchased with the proceeds of a former cargo exported in contravention of law. Kenyon, C. J.: “If this objection were well founded, in deciding on a claim made on a policy of insurance, it would be necessary to examine the past conduct of the assured, to see whether they had illegally acquired the funds with which the goods were purchased. We cannot enter into considerations of that kind; we must confine ourselves to the immediate transaction before us.”<sup>4</sup>

So, where the master, in the course of the voyage, took on board a smuggled chain-cable, though he had intended so to do at the time of sailing, Mr. Justice Story said, it “was a collateral act, no more touching the legality of the voyage than if there had been taken on board some illegal ship-stores,” and accord-

<sup>1</sup> The Abbey, 5 C. Rob. Adm. 251.

<sup>2</sup> Ibid. 254.

<sup>3</sup> Lubbock v. Potts, 7 East, 449.

<sup>4</sup> Bird v. Appleton, 8 Term, 562;

and see Ocean Ins. Co. v. Polleys, 13

Pet. 157; Armstrong v. Toler, 11 Wheat.

258; Ward v. Wood, 13 Mass. 539,

546.



ingly held that the policy on the ship was not thereby defeated.<sup>1</sup>

So, not stowing water below deck, as required by statute,<sup>2</sup> or not taking on board a pilot, where a forfeiture is incurred thereby,<sup>3</sup> does not render the voyage illegal.

But the violation of a law against carrying goods on deck invalidates a policy on the whole cargo.<sup>4</sup>

222. *The circumstance that goods are the proceeds of an illegal trade or interest, is not conclusive of the illegality of the owner's interest in them, but it is a matter of ordinary practice, where the national character of goods is in question, to prove the ownership of those with which they are purchased, as in case of a return cargo purchased with the proceeds of the outward one.*<sup>5</sup>

223. *It being illegal to buy of public enemies, or to sell to them, or contract with them, the goods and ships, and any other subjects of insurance, embarked in such intercourse, or destined to it, or to be derived from it, become affected by the prohibition. Property or interests, so employed, or so situated, cannot lawfully be protected by insurance.*<sup>6</sup>

Such a contract or trade is not excused on the ground of mistake or ignorance, any more than any other contravention of law.<sup>7</sup>

We have already seen that underwriters cannot legally contract with or in favor of public enemies; and on the same principle, they cannot insure citizens on property implicated in trade with enemies. The illegality of such trade taints all the property involved in it, and all the contracts auxiliary to it.

<sup>1</sup> *Clark v. Protection Ins. Co.* 1 Stor. C. C. 109. See also *Warren v. Manuf. Ins. Co.* 13 Pick. Mass. 518; *Johnson v. Hudson*, 11 East, 180; *Carruthers v. Gray*, 15 East, 35; *Ward v. Wood*, 13 Mass. 539. See *infra*, sect. 8, as to contracts made through necessity.

<sup>2</sup> *Deshon v. Merchants' Ins. Co.* 11 Metc. Mass. 200.

<sup>3</sup> *Keeler v. Firemen's Ins. Co.* 3 Hill, N. Y. 250; *Flanigan v. Washington Ins. Co.* 7 Penn. 307.

<sup>4</sup> *Cunard v. Hyde*, 2 Ell. & E. 1.

<sup>5</sup> *The Nancy*, 3 C. Rob. Adm. 122; *The Rosalie and Betty*, 2 id. 343; *The*

*Rosalie and Elizabeth*, 4 id. note to table of cases; *The Baltic*, 1 Act. Ap. Cas. 25; *The Margarett*, id. 333; *The Joseph*, 8 Cranch, 451; *The Caledonian*, 4 Wheat. 100; *Carrington v. The Merchants' Ins. Co.* 8 Pet. 495.

<sup>6</sup> *Le Guidon*, c. 2, a. 2 and 5; *The Joseph*, 1 Gall. C. C. 545; *The Rapid*, 8 Cranch, 155; and see 3 Kent, Com. 5th ed. 253; 1 Emer. c. 4, s. 9; *Consulat de La Mar.* c. 344; *Poth. des Ass.* n. 95; *The Eenrom*, 2 C. Rob. 1.

<sup>7</sup> *The Compte de Wohronzoff*, 1 C. Rob. Adm. 205 a.; *The Expedit van Rotterdam*, 1 id. 206.

When, however, Lord Mansfield and other English judges favored insurance on behalf of public enemies, they could not but extend the indulgence to trade carried on with them. Accordingly, in a case of a policy on goods, bought in Holland after the commencement of war, Buller, J., said, the "underwriter had no right to go into the state of the property, previous to the time when he insured," and could not object that it had been purchased of the enemy.<sup>1</sup> Mr. Justice Heath concurred, but Mr. Justice Rooke was inclined to dissent. Lord Mansfield said,<sup>2</sup> that though trade with the enemy is prohibited by the maritime law, he knew of but two cases to that effect at common law, seeming to intimate a doubt whether it was in fact prohibited at common law. Numerous decisions had been made in the Admiralty, and in the House of Lords, that trade with the enemy was unlawful.<sup>3</sup> Insurance on such a trade would accordingly have been void. This point was considered particularly by Sir William Scott, in 1799, in the case of goods imported from Holland by Englishmen, while that country was at war with England, and he held, that the goods were subject to seizure and forfeiture.<sup>4</sup> And soon afterwards Lord Kenyon and the other judges of the King's Bench acquiesced in this opinion, and held, that an insurance of goods so imported was void.<sup>5</sup>

The unlawfulness of trade with the enemy has been a subject of frequent consideration in the courts of the United States. Mr. Justice Story says: "I lay down as a fundamental proposition, that, strictly speaking, in war all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the government, or in the exercise of the rights of humanity."<sup>6</sup> And this doctrine is generally, and at least all but universally, adopted by different nations.<sup>7</sup>

224. *It belongs to the government to declare war and make peace, and to decide what territories, municipalities, and communities are to be considered hostile, and what ones friendly; and the*

<sup>1</sup> Bell v. Gilson, 1 Bos. & P. 345.

<sup>2</sup> Gist v. Mason, 1 Term, 84.

<sup>3</sup> Cases cited, 1 C. Rob. 202, &c., in the case of The Hoop.

<sup>4</sup> The Hoop, 1 C. Rob. Adm. 196.

See also The Odin, 1 C. Rob. Adm. 248.

<sup>5</sup> Potts v. Bell, 8 Term, 548.

<sup>6</sup> The Julia, 8 Cranch, 181.

<sup>7</sup> See 1 Duer, Mar. Ins. 417, 461.

*established national character of any one is presumed by the courts to continue until a new one is recognized by the government.*<sup>1</sup>

225. *It is usual for a country in determining who are to be considered its enemies, to have great regard to the government de facto, and early to recognize revolted colonies or districts, that maintain an independent government, as having ceased to retain the national character of the country from which they have revolted, in respect to trade; as was done by Great Britain in respect to parts of the island of St. Domingo.*<sup>2</sup>

226. *Where a citizen's property, remaining in the hostile country at the breaking out of a war, is imported thence by him during the war, it is presumed to be a trading with the enemy.*<sup>3</sup>

A citizen's property, says Mr. Justice Story, "cannot be removed with safety from the enemy's country, unless under the sanction of his own government, because the law would never deem that a reasonable mode of conveying property which involved in it a trade with the public enemy."<sup>4</sup>

An American citizen had purchased goods in England before the war of 1812, and deposited them on Indian Island, belonging to the British, and near the boundary of the United States, and, after the breaking out of the war, a vessel was sent from Boston to fetch the goods. Both vessel and cargo were forfeited, and consequently the owners of neither could have protected their interest by insurance.<sup>5</sup>

Accordingly, a citizen having property in the enemy country at the breaking out of a war, cannot safely withdraw it without obtaining a license of his own government for the purpose;<sup>6</sup> more especially any considerable time after the commencement of hostilities.<sup>7</sup> And insurance upon it in his own country on its passage, being withdrawn without a license, would be illegal and void.

<sup>1</sup> *The Manilla*, Edw. Adm. 1; *The Pelican*, Edw. Adm. App. D.; *City of Berne v. Bank of England*, 9 Ves. jun. 347; *Gelston v. Hoyt*, 13 Johns. N. Y. 561.

<sup>2</sup> *Johnson v. Greeves*, 2 Taunt. 344; *Blackburn v. Thompson*, 15 East, 81.

<sup>3</sup> Cases cited, 1 C. Rob. Adm. 202, &c. case of *The Hoop*.

<sup>4</sup> *The Joseph*, 1 Gall. C. C. 545.

<sup>5</sup> *The Rapid*, 8 Cranch, 155. See also *The Alexander*, 8 Cranch, 169.

<sup>6</sup> *The Lady Jane*, 1 C. Rob. Adm. 202.

<sup>7</sup> *The St. Lawrence*, M'Gregor's Claim, 1 Gall. C. C. 471; 9 Cranch, 120. See also *The William*, cited 1 C. Rob. Adm. 214; *Amory v. M'Gregor*, 15 Johns. N. Y. 36; and *The Mary*, 9 Cranch, 126.

But the withdrawal of property in such case by a citizen, without license, under circumstances preventing an application for a license, and where it would certainly have been granted if applied for, was sanctioned by Sir William Scott.<sup>1</sup>

227. *If a citizen, having ordered goods from abroad, has no opportunity to countermand his order after notice of a war, the importation is legal.*<sup>2</sup>

The shipment by a vessel that sailed after the declaration of war, but before it was known at the port of shipment, was sanctioned by the Supreme Court of the United States.<sup>3</sup>

228. *If a contract with the enemy arises from compulsion or stringent necessity, the law will sanction it.*<sup>4</sup>

Thus, where a British prisoner of war abroad contracted a debt to an enemy subject for his necessary subsistence, the contract was enforced in England after peace.<sup>5</sup>

229. *So a party, whose property has been seized by the enemy, or by persons with whom trade is interdicted, may lawfully take such goods as are given him in exchange.*

Trade with France and its dependencies being interdicted by an act of Congress, an American ship was driven, by stress of weather, into Port St. François, in St. Domingo, a French port, where a part of the cargo was seized by the public officers, who forbade the exportation of the rest, but gave the captain leave to exchange it for the produce of the island. It was held that the goods obtained in exchange might be insured.<sup>6</sup> And Chief Justice Marshall said, in delivering the opinion of the court, that, even if an actual and general war had existed between this country and France, "this would not have been

<sup>1</sup> The Madonna del Gracia, 4 C. 141; The Fortuna, 1 id. 11; The Rob. 195. See also upon this subject The Juffrow Louisa Margaretta, 1 C. Rob. Adm. 203; S. C. 1 Bos. & P. 349, n.; The Rapid, 1 Gall. C. C. 295; S. C. 9 Cranch, 132; The St. Philip, cited 8 Term, 356; The Eenigheid, cited 1 C. Rob. 210; The Fortuna, 1 C. Rob. 211; The Mary, 1 Gall. C. C. 620; S. C. 9 Cranch, 126; 1 Duer, Mar. Ins. 554, Lect. 6, s. 9-11.

<sup>3</sup> The Merrimac, 8 Cranch, 317.

<sup>4</sup> Griswold v. Waddington, 16 Johns. N. Y. 451.

<sup>5</sup> Antoine v. Morehead, 6 Taunt. 237; and see Grotius, de Jur. Bel. et Pac. l. 3, c. 22; Puffend. l. 8, s. 14; Vattel, b. 3, c. 16, s. 264.

<sup>6</sup> Jenks v. Hallett, 1 Caines, N. Y. 60; 1 Caines Cas. N. Y. 43.

<sup>2</sup> The Juffrow Catharina, 5 C. Rob.



deemed such a traffic with the enemy as would vitiate the policy upon the new cargo.”<sup>1</sup>

230. *Articles may be shipped for an enemy's port, at the time in possession, or reasonably and bonâ fide supposed to be in possession, of the forces, naval or military, of the shipper's own country, for the purpose of supplying such forces.*

A vessel destined to Copenhagen, with supplies intended for the fleet under Lord Nelson, left the Nore three days after the time when, by the articles of capitulation, the British fleet was to leave Copenhagen, under the expectation that some delay might occur to the fleet. The voyage was held to be lawful, and the insurance valid, though the vessel was destined to an enemy's port.<sup>2</sup>

231. *Where a part of the round voyage is illegal, and another distinct part legal, a valid insurance may be made on ship or cargo for the legal part; provided the ownership does not render the insurance illegal.*

A foreign-built ship, chartered for a voyage from England to St. Michael's and back, to bring a cargo of fruit, and insured for the outward voyage only, was seized at St. Michael's before the termination of the risk under the policy. It was objected to payment of a loss by the seizure, that the importation, into England, of a cargo of fruit, in such a ship, was prohibited by statute, as the charter was outward and homeward, and so it was one entire voyage, and no part of it could be insured. But the English Court of Common Pleas held the insurance to be valid, for a license might have been obtained for the homeward voyage, or the master might have refused to proceed homeward with such a cargo on account of its being illegal.<sup>3</sup> That is to say, up to the time of the loss, it was at most but an intent to contravene the law.

So where, in the outward voyage to India, an American ship, insured in England, took a cargo of cotton at Bombay for Canton, contrary to the treaty between the United States and England, and the master used the proceeds of the cotton in

<sup>1</sup> Hallett v. Jenks, 3 Cranch, 210.

Chitt. 49, and Gill v. Dunlop, 7 Taunt.

<sup>2</sup> Atkinson v. Abbott, 11 East, 135;

193, and other cases cited supra, No.

1 Campb. 535. As to a destination to ports on a coast generally, some being hostile and others neutral, see Anon. 1

217.

<sup>3</sup> Sewell v. Royal Exch. Ass. Co. 4 Taunt. 855.

purchasing a cargo at Canton for Hamburg, whitherward he sailed, and was captured on the voyage by the French, the jury found that the homeward voyage was distinct from the outward. The court of King's Bench, Lord Kenyon being C. J., held a policy effected in England on the cargo or the homeward voyage, to be valid.<sup>1</sup>

But in another case Lord Kenyon gives a different opinion. Speaking of a voyage from the United States to Bordeaux, Madeira, and the East Indies, he remarked, that, "where there is a legal infirmity in any part of an integral voyage, it renders the whole illegal, so as to prevent a recovery, even on a separate policy, upon any part of it, which, distinct from the other, would have been lawful."<sup>2</sup>

Upon this case Mr. Justice Story<sup>3</sup> remarks, that "this was a mere obiter dictum, and it is somewhat shaken, if not overturned, by the decision" in a subsequent case.<sup>4</sup> And he further says, that "it will be exceedingly difficult, in point of principle, to distinguish an illegality in a former voyage, and that in a prior part of the same voyage, when the policy covers only the part which is legal."

In the preceding cases no illegality appeared on the face of the contract of insurance. Where such does appear, the whole contract is void, as in case of an agreement to employ a ship in an illegal trade.<sup>5</sup>

If the contract is on its face legal, and the passage or adventure contracted about is legal, the weightier authority seems to be in favor of the validity of the contract, though the subject contracted about may be, on one side or the other, precedent or consequent to something not sanctioned by the law.

232. *Where the voyage is legal, but part of the articles of the same party insured in the same policy are illegal, and a part legal, for such voyage, according to the cases preponderating, both in authority and number, the insurance is wholly void, upon the alleged ground that the contract is entire, and the tribunals cannot discriminate between the legal and illegal part, and enforce the former and declare the latter void.*

<sup>1</sup> Bird v. Appleton, 8 Term, 562.

<sup>4</sup> Bird v. Appleton, 8 Term, 562.

<sup>2</sup> Wilson v. Marryatt, 8 Term, 31, and 1 Bos. & P. 480.

<sup>5</sup> Holland v. Hall, 1 Barnw. & Ald.

53. See remarks of Mr. Duer, Mar.

<sup>3</sup> Clark v. Protection Ins. Co. 1 Stor. Ins. Vol. I. p. 397. C. C. 126.

Thus, where a part of a shipment consisted of naval stores, the exportation of which was prohibited, under penalty of the forfeiture of the same and of the ship, Lord Ellenborough said: "It had been decided a hundred times, that, if a party insure goods altogether in one policy, and some of them are of a nature to make the voyage illegal, the whole contract is illegal and void."<sup>1</sup>

So, where a part of the goods belonging to a shipper were contraband, Sir William Scott condemned the whole of his shipment, saying, "To escape the contagion of contraband, the innocent articles must be the property of a different person."<sup>2</sup>

So, where the law required that, on the exportation of gunpowder, a bond conditioned to export it to the place proposed should be given by the "merchant exporter," and the bond of the manufacturer was given instead of that of the exporter, Lord Tenterden and his associates held a policy on the powder and other goods of the same assured, to be void, in respect to the other goods as well as the powder.<sup>3</sup>

But there are not wanting opposite decisions on this question, and some of them by the same courts; and in some of the cases in which the operation of the rule above laid down was evidently so inequitable, and the penalties and forfeitures incidentally, and in fact casually, thereby inflicted, were so palpably out of proportion to the offence, if there was any,—for many of the cases are those of mistake or oversight,—the judges have not disguised their misgivings in applying the rule. The French law allows the discrimination.<sup>4</sup>

*Divers decisions* of the English Court of Common Pleas *make a discrimination of the legal and illegal goods* shipped by the same party, and insured in the same policy. Insurance being made on a cargo, a part of which was liable to condemnation on account of being imported from the enemy's country, the importation of the rest being authorized by a license, the insurance was considered valid in respect to the goods covered by the

<sup>1</sup> *Parkin v. Dick*, 11 East, 502; S. C. 2 Campb. 221. See also *Gordon v. Vaughan*, 12 East, 302.

<sup>2</sup> *The Stadt Embden*, 1 C. Rob. 26. See *Bynk. Q. J. Pub. l. 1, c. 14*; and *The Jonge Tobias*, 1 C. Rob. 329.

<sup>3</sup> *Camelo v. Britten*, 4 Barnew. & Ald. 184.

<sup>4</sup> *Marine Ord. of Louis XIV. Ins. a. 19*; *Poth. Ins. n. 44*; 1 *Duer, Mar. Ins.* 393, 394.

license.<sup>1</sup> And in the case of insurance on three hundred barrels of gunpowder, the exportation of only half of which was licensed, and the law provided that gunpowder exported without license should be forfeited, and also the ship in which it was exported, Gibbs, C. J., said: "The licensed barrels were not forfeited; then the exportation of them was legal, and the insurance thereon is also legal."<sup>2</sup>

*The rule adopted by that court is certainly recommended by very strong equitable considerations, and is not apparently attended by any practical objections.*

233. *In case of the capacity of the insurers to contract being limited by law, the excess of the contract over the limit is void.*

A fire policy being made for \$3500, and the policy itself showing that the insurance company was authorized to insure only \$3000, it was held to be void for the surplus.<sup>3</sup>

234. *Where an agent ships goods for divers principals, some of whom are of opposite belligerent countries, others neutral, and insures them all in the same policy, on account of his principals respectively, who have between themselves no partnership or joint interest, the policy being made in one of the belligerent countries, is valid in respect to the interest of the subjects of that country, and also that of the neutrals.*<sup>4</sup>

In such case it was held that the legal interests are not contaminated by the illegal; and there does not appear to be any reason that the comprehending of all the divers shipments, in one general valuation indiscriminately, should affect the validity of the contract as to the lawful goods, since this is merely substituting another value, proportionately, for the invoice value.<sup>5</sup> The interests were stated in proportions of a sixteenth, eighth, &c.<sup>6</sup>

235. In the preceding case the interests in the goods and those in the policy were entirely distinct, having no connection except

<sup>1</sup> Pieschell v. Allnutt, 4 Taunt. 792.  
See also Butler v. Allnutt, 1 Stark. 222,  
a precisely similar case.

<sup>2</sup> Keir v. Andrade, 6 Taunt. 498; 2  
Marsh. 196. See also The Vriendschap,  
4 C. Rob. Adm. 166.

<sup>3</sup> Holmes v. Charlestown Mut. Fire  
Ins. Co. 10 Metc. Mass. 211.

<sup>4</sup> Hagedorn v. Bazette, 2 Maule & S.  
100.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.



the transaction through the same agency, and the insurance in the same policy.

But *where the interests are joint and inseparably connected, so that the loss or gain necessarily affects all the parties interested in the property and in the policy, if the insurance of any of the parties is in contravention of law, or the interest of any party is contaminated by such contravention, relative to the property or risk, the whole interest is contaminated, and the insurance is void.*<sup>1</sup>

236. *The official character of a neutral consul in a belligerent country, does not confer upon him any commercial privilege.*<sup>2</sup>

237. *The circumstance that the goods of a belligerent subject, destined to the enemy at his risk, are to go first to a neutral port, will not make the adventure lawful.*

During a war between Great Britain and Holland, it was not permitted to a British merchant to send goods to Embden, then a neutral port, with the view of sending them forward, on his own account to a Dutch port.<sup>3</sup>

238. *Where a country is in possession of the troops of the enemy, but continues to be under the administration of its own government, the inhabitants have been considered as neutrals in some cases.*<sup>4</sup> In general, however, "though acquisitions made during war are not considered as permanent until confirmed by treaty, yet, to every commercial and belligerent purpose, *they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them.*"<sup>5</sup>

In the case of goods shipped for Messina, a friendly port, but consigned to the subject of a neutral nation resident at Leghorn, a port at that time occupied by the enemy, the trade was ruled by Lord Ellenborough to be lawful, and the insurance valid.<sup>6</sup>

239. *A ship is reputed to have the character of the nation under*

<sup>1</sup> *Clark v. Protection Ins. Co.* 1 Stor. C. C. 109. The expression of the doctrine on the subject by Mr. Justice Story in this case is more general than that of the text, but I understand his meaning to be limited as in the text.

<sup>2</sup> *Albright v. Sussman*, 2 Ves. & B. Ch. Ir. 323.

<sup>3</sup> *The Jonge Pieter*, 4 C. Rob. 79.

<sup>4</sup> *Hagedorn v. Bell*, 1 Maule & S. 450.

<sup>5</sup> *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191.

<sup>6</sup> *Bromley v. Hesseltine*, 1 Campb. 75.

*the flag and pass of which she sails;¹ and consequently is not insurable if she sails under the flag and pass of the enemy. But the flag does not determine the national character of the cargo.²*

240. *Where a resident in one country there insures his interest in ships fitted out from and bearing the flag and national character of another in which the other part-owners reside, the policy is valid against detention by such other country, preliminary to and followed by hostilities between the two countries.³*

But the interest which a person resident in a neutral country has in a house of trade established in the country of the enemy, has been considered to have the national character of the hostile country.⁴

241. *If property is seized provisionally in contemplation of hostilities, and war is afterwards declared, the declaration will have a retroactive operation in respect to the property so seized, which will be liable to confiscation in the same manner as if the declaration had preceded the seizure.⁵*

242. As the personal disability of an alien enemy to make contracts and bring actions may be removed, by his privilege of holding property, or by a safe-conduct, or a license, so *a license or privilege granted by sufficient authority will, in like manner, make it lawful in a subject to carry on trade with the public enemy, and any property employed, or trade conducted, within the privilege, will not be divested of any of the rights which usually belong to it, and it may accordingly be insured.*

243. *Whatever man or body of men, in a community, has the power of declaring and carrying on war, the same has, as incident to such power, the right to qualify the declaration, and exempt any persons or property from its operation.*

This is only continuing or restoring peace, as to some of the subjects of a foreign state or their property, or as to particular descriptions of trade. There is indeed some qualification of hostilities, or something of the character of peace, in all wars between civilized nations, as in the case of cartels, flags of truce, and all

¹ The Vrow Elizabeth, 4 C. Rob. 2;  
The Vreede Scholtys, 5 C. Rob. 5, n.

² The Vreede Scholtys, 5 C. Rob. 5.

³ Rotch v. Edie, 6 Term, 413.

⁴ The Friendschaft, 4 Wheat. 105.

⁵ The Boedes Lust, 5 C. Rob. 233;  
The Herstelder, 1 C. Rob. 113; Lucena v. Craufurd, 8 Term, 13; 3 Bos. & P. 75; 5 Bos. & P. 269.

the cases that come within the rules of civilized warfare. Licenses and privileges to individuals, or to specific property or kinds of trade, are only an extension of the principles upon which such rules are founded, with this distinction, that the rules of warfare may be the dictates of humanity, whereas licenses and exemptions, in respect to trade, are usually granted upon considerations of interest.

244. To divest a trade of its hostile character *the license* under which it is conducted *must be granted by a sufficient authority*.<sup>1</sup>

245. *It can be used only by the persons in whose favor it is granted*,<sup>2</sup> *and is not transferable unless it appears to be so on its face*;<sup>3</sup> *but may run "to any person," in which case it may be used by an enemy subject*.<sup>4</sup>

246. *It avails only for the time specified*.<sup>5</sup>

247. *The trade must be conducted in compliance with the terms and conditions, and within the limits of the license*.<sup>6</sup>

<sup>1</sup> Vanharthals v. Halbed, 1 East, 487, n.; Vandyck v. Whitmore, 1 East, 475; Shiffner v. Gordon, 12 East, 296; Schroeder v. Vaux, 15 East, 52; The Hope, 1 Dods. Adm. 226.

<sup>2</sup> Fayle v. Bourdillon, 3 Taunt. 546; Usparicha v. Noble, 13 East, 332; Feise v. Bell, 4 Taunt. 4; Morgan v. Oswald, 3 Taunt. 554; Klingender v. Bond, 14 East, 484; Rawlinson v. Janson, 12 East, 223; The Beurse Van Konningsberg, 2 C. Rob. 169; The Jonge Johannes, 4 id. 263; The Jonge Klassina, 5 id. 297; The Cousine Marianne, Edw. Adm. 346; Busk v. Bell, 16 East, 3; Barlow v. M'Intosh, 12 East, 311; S. C. 3 Campb. 160; S. P. Robinson v. Cheeswright, 1 Maule & S. 220; Hagedorn v. Bazette, 2 Maule & S. 100; Waring v. Scott, 4 Taunt. 605; Vaughan v. Lemcke, 7 Dowl. & R. 236; S. C. 8 Moore, 646, 1 Bingh. 473; Grigg v. Scott, 4 Campb. 339, Holt, 129; Robinson v. Morris, 5 Taunt. 720; Feise v. Newnham, 16 East, 197; Mennet v. Bonham, 15 East, 477; Hullman v. Whitmore, 3 Maule & S. 337.

<sup>3</sup> Feise v. Thompson, 1 Taunt. 121.

<sup>4</sup> The Louisa Charlotte, 1 Dods. Adm. 308; Mennet v. Bonham, 15 East, 477.

<sup>5</sup> Robinson v. Touray, 1 Maule & S. 217; Feise v. Waters, 2 Taunt. 248; Siffkin v. Allnut, 1 Maule & S. 39; Freeland v. Walker, 4 Taunt. 478; Leevin v. Cormac, 4 Taunt. 483; Williams v. Marshall, 1 J. B. Moore, 168; 2 Marsh. 292; 6 Taunt. 390; 7 Taunt. 468; Tullock v. Boyd, 1 Moore, 174; 7 Taunt. 471; The Goede Hoop, Edw. Adm. 327; The Carl, id. 339; The Johan Pieter, id. 355; Groning v. Crockat, 3 Campb. 83; Siffkin v. Glover, 4 Taunt. 717.

<sup>6</sup> Le Cheminant v. Pearson, and Same v. Allnutt, 4 Taunt. 367; Hagedorn v. Reid, 1 Maule & S. 567, 3 Campb. 377; Hullman v. Whitmore, 3 Maule & S. 337; Anthony v. Moline, 5 Taunt. 711; Rucker v. Ansley, 5 Maule & S. 25; Everth v. Tunno, 1 Barnew. & Ald. 142; Butler v. Allnutt, 1 Stark. 222; The Cosmopolite, 4 C. Rob. 8; The Hoffnung, 2 id. 162; The Jonge Arend, 5 id. 14; The Juffrow Catharina, 5 id. 141; The Clio, 6 id. 67; The



248. *But a license to a citizen to trade with the enemy, or to an enemy to trade, has been considered to be a proper subject for a liberal construction.*<sup>1</sup>

249. *Stress of weather, or other unforeseen, absolute necessity, will excuse a deviation from the course specified by the license ;*<sup>2</sup> but compulsion by the enemy to take goods on board cannot be alleged.<sup>3</sup>

250. *A license will not operate retrospectively, so as to divest vested rights, as those of captors.*<sup>4</sup>

251. *A licensed shipment is not affected by one unlicensed, made by a different shipper, on board of the same vessel.*<sup>5</sup>

252. *The license being forfeited, or its terms not complied with, insurance upon the trade with the enemy, or upon enemy property licensed, will thereupon be void.*

253. As a license from a merchant's own government renders a trade lawful which would otherwise be unlawful, so *a license or privilege from an enemy, or belligerent, invests the licensed trade with the national character of the license.*<sup>6</sup>

Thus, in the case of a voyage from the United States to Portugal, with which the United States were at peace, Great Britain being at the same time at war with the United States, where the ship had on board a license from a British admiral, for the pur-

*Twee Gebroeders*, Edw. Adm. 95 ; *The Byfield*, id. 188 ; *The Catharina Maria*, id. 336 ; *The Wolfarth*, id. 365 ; *The Europa*, id. 342 ; *The Vrow Cornelia*, id. 349 ; *The Jonge Frederick*, id. 357 ; *The Cornelia*, id. 360 ; *The Henrietta*, 1 Dods. Adm. 168 ; *The Hoppett*, Edw. Adm. 369 ; *The Speculation*, id. 344 ; *The Twee Gebroeders*, id. 95 ; *Gordon v. Vaughan*, 12 East, 302, n. ; *Norville v. St. Barbe*, 4 Bos. & P. 434.

<sup>1</sup> *Defflis v. Parry*, 3 Bos. & P. 3 ; *Robinson v. Touray*, 1 Maule & S. 217 ; *Feise v. Waters*, 2 Taunt. 248 ; *Fayle v. Bourdillon*, 3 Taunt. 546 ; *Flindt v. Scott and Same v. Crockatt*, 5 Taunt. 674 ; *Usparicha v. Noble*, 13 East, 332 ; *Feise v. Bell*, 4 Taunt. 4 ; *Morgan v. Oswald*, 3 Taunt. 554 ; *Hagedorn v. Reid*, 1 Maule & S. 567, 3 Campb. 377 ;

*Kensington v. Inglis*, 8 East, 273 ; *The Juno*, 2 C. Rob. 116 ; *The Planter's Wench*, 5 id. 22 ; *The Goede Hoop*, Edw. Adm. 327 ; *Hullman v. Whitmore*, 3 Maule & S. 337. Mr. Duer remarks that the doctrine of liberal construction of licenses was adopted in England during the time of Bonaparte's continental system. 1 *Marine Ins. Lect.* 6, s. 37.

<sup>2</sup> *The Manly*, 1 Dods. Adm. 257 ; *The Twee Gebroeders*, Edw. Adm. 95 ; *The Cornelia*, id. 360 ; *The Sarah Maria*, id. 361 ; *The Minerva*, id. 375.

<sup>3</sup> *The Seyerstadt*, 1 Dods. Adm. 241 ; *The Oster Risoer*, 4 C. Rob. 199.

<sup>4</sup> *The St. Ivan*, Edw. Adm. 376.

<sup>5</sup> *The Jonge Clara*, Edw. Adm. 371.

<sup>6</sup> *The Anna Catharina*, 4 C. Rob. 118.



pose of protecting the property from British capture, the voyage was adjudged to be rendered illegal by the use of the license;<sup>1</sup> and would have been so, even though the license had been procured by the agent, without the owner's knowledge.<sup>2</sup> It was held in Connecticut, that such a license, obtained through the minister of the neutral country, to whose territories the voyage was intended, did not render the voyage illegal.<sup>3</sup> The Supreme Court of the United States was, however, of opinion, that "the mere sailing under an enemy's license constituted of itself an act of illegality."<sup>4</sup> An agreement that a ship should have one of these licenses on board, was held in New York to be illegal and void, and so was a policy warranting the ship to have such a license.<sup>5</sup>

254. *A cartel for exchange of prisoners between belligerents, is, by the modern usage of nations, put upon the footing of a vessel licensed by the belligerents for that purpose.*<sup>6</sup> The cartel may be characterized as a messenger under a flag of truce; and it may be bottomried in the enemy port, to an enemy lender.<sup>7</sup>

255. *The transfer of belligerent or enemy property while in transitu at sea, to a neutral, for the purpose of screening it from capture, does not change its national character;*<sup>8</sup> nor does the countermand of the consignment in transitu by a belligerent consignor, where the neutral consignee, at whose risk it was shipped, is solvent.<sup>9</sup>

<sup>1</sup> The Julia, 8 Cranch, 181. See also The Aurora, 8 Cranch, 203.

<sup>2</sup> The Hiram, 1 Wheat. 440.

<sup>3</sup> Bulkley v. Derby Fishing Co. 1 Conn. 571.

<sup>4</sup> The Ariadne, 2 Wheat. 143. See also Craig v. United States Ins. Co. 1 Pet. 410.

<sup>5</sup> Ogden v. Barker, 18 Johns. N. Y. 87; Colquhoun v. N. Y. Firemen's Ins. Co. 15 Johns. N. Y. 352. But a policy on one of these licenses, valued at a certain sum, was decided in Massachusetts to be a valid and legal contract. Perkins v. N. E. Marine Ins. Co. 12 Mass. 214. And accordingly the same court held, that the having such a license on board of the ship, for the purpose of protecting the cargo against

capture, did not render the voyage illegal or make a policy on the cargo void. Parker, C. J., said: "Even if the parties had incurred a penalty for possessing the paper, still the voyage was left untainted, and the insurance valid." Hayward v. Blake, 12 Mass. 176. But this case is inconsistent with the preceding ones, and with the current of jurisprudence bearing on the subject.

<sup>6</sup> The Daiffie, 3 C. Rob. 139; La Gloire, 5 id. 192; The Mary, 5 id. 200.

<sup>7</sup> The William Penn, Pet. C. C. 106.

<sup>8</sup> The Vrow Margaretha, 1 C. Rob. 336; The Carl Walter, 4 id. 207; The Jan Frederick, 5 id. 128.

<sup>9</sup> The Constantia, 6 C. Rob. 321.

256. *A merely colorable, pretended sale, or retaining of the title to property sold, does not prevent the subject from being adjudicated upon according to the real ownership of the property.*<sup>1</sup>

257. *A sale to a neutral of a public belligerent vessel, chased into a neutral port, which it could not leave without being captured, is void as against the claim of the cruiser ;<sup>2</sup> but it is otherwise of a private vessel.*<sup>3</sup>

258. *A neutral whose property is implicated in the commerce of a belligerent country, at the breaking out of a war, is allowed sufficient opportunity to disentangle it, before it will become impressed with the hostile character of the country.*<sup>4</sup>

259. *Property shipped at the shipper's risk to an enemy, on an agreement for sale to the latter on delivery at the port of destination, is undoubtedly not insurable by the shipper, being shipped in pursuance of an illegal contract.*

260. *Property shipped by a neutral, in like manner, to a belligerent, has been considered belligerent while in transitu,<sup>5</sup> but may be legally insured in either the country of the shipper or that of the consignee.*

261. *The lien which a neutral ship has on belligerent goods on board of it, for freight or for contribution or for jettison, is a neutral interest, and as such is undoubtedly legally insurable, in either belligerent country, being recognized by the general law to be a valid claim as against the captors of goods, of which the neutral owner of the ship has possession.*<sup>6</sup>

<sup>1</sup> The Omnibus, 6 C. Rob. 71 ; The Sechs Geschwistern, 4 id. 100 ; The Vrow Hermina, 1 id. 163 ; and Admiralty Jurisprudence passim.

<sup>2</sup> The Minerva, 6 C. Rob. 396.

<sup>3</sup> Ibid.

<sup>4</sup> The Dree Gebroeders, 4 C. Rob. 232 ; The Adriana, 1 id. 313 ; The Jacobus Johannes, 1 id. 14, which was the case of a neutral partner of a house in the belligerent country ; The Osprey, 1 id. 14. See also Vattel and Azuni.

<sup>5</sup> The Sally, 3 C. Rob. 300, n. ; The Vrow Margaretha, 1 id. 336 ; The Pack-et de Bilbao, 2 id. 133 ; The Jan Frederick, 5 id. 128 ; The Atlas, 3 id. 299 ;

The Frances, Thompson's Claim, 8 Cranch, 335, 1 Gall. C. C. 455, 616 ; The Ann Green, 1 Gall. C. C. 274 ; Opinion of Kent, J., in Ludlow v. Bowne, 1 Johns. N. Y. 1 ; 1 Kent, Com. 86, 87, 5th ed. A majority of the court in Ludlow v. Bowne, ut supra. De Wolf v. N. Y. Firemen's Ins. Co. 20 Johns. N. Y. 214, and S. C. 2 Cow. N. Y. 56, are opposed to the doctrine stated in the text ; in the latter of which cases the doctrine is denounced by Spencer, C. J., of the Supreme Court, in strong terms. See 1 Duer. Mar. Ins. 421, Lect. 4, s. 13, and note 3, p. 478.

<sup>6</sup> The Rising Sun, 2 C. Rob. 104 ;

There is a distinction between these claims by neutrals and *other liens*, as one for advances made by a foreign agent of a neutral for the purchase of goods on an order of a belligerent, to whom they are consigned, or that of a neutral shipper of goods consigned to a belligerent consignee, from whom a general balance of account is due to such shipper.<sup>1</sup>

In case of the former claims, the neutral ship-owner has rendered a service by transporting or saving the property, of which the captor ought not to avail himself without making compensation; but in the other cases the lien is of a different description, and is not recognized as valid against the captor.

So the claim of a neutral shipper against a belligerent ship, for contribution on account of jettison of goods, is not recognized in the prize courts as binding on the captor of the ship,<sup>2</sup> for the shipper has not a lien upon the ship, fortified by possession to enforce his claim, as the ship-owner has on the cargo to enforce his; though the equitable ground for his claim is precisely the same.

These liens and claims, whether of one description or the other, may be legally insured in a neutral country, as far as they constitute liens on the property at risk, and it does not appear that they may not be so, in either belligerent country, care being taken so to describe the interest in the policy, that the risk may be fully understood by the underwriter. The interest and liens are in all the cases equally neutral, and though one description of liens or claims upon the property is respected by the prize courts, and the other is not recognized, the reasons for holding that insurance on enemy property cannot be permitted by law do not seem to apply to a policy upon either.

Wherever a party has a claim, satisfaction of which depends upon the safe arrival of property at its destination, he has a sufficient insurable interest in its arrival, though, if no lien exists, he has no insurable interest in the property itself that will be covered by a general insurance upon it. The contract of indemnity should specify the interest upon which the insurance is made, and the event insured against; that is, the event whereby the party having the claim may be prevented from obtaining satisfaction.

The Marianna, 6 id. 24. See also The Hoffnung, 6 id. 383, and The Frances, Irving's Claim, 8 Cranch, 418.

<sup>1</sup> The Frances, Irving's Claim, 8 Cranch, 418.

<sup>2</sup> The Hoffnung, 6 C Rob. 383.



Where the party so interested has rightful possession of the property, his interest is equivalent to that of a part-owner, and the interest of a part-owner is respected in the prize courts, though the other part-owners are belligerent, provided the whole property has not some belligerent badge.<sup>1</sup>

262. *The belligerent character of a ship has been considered not to be at all qualified by bottomry to a neutral*, and the ship so hypothecated has been condemned in the antagonist belligerent country in the same manner as if there had been no such hypothecation.<sup>2</sup>

263. *So, where goods become enemy property, the lien of an agent is not distinguishable*, but the whole property will be considered as enemy property without any exception of the lien.<sup>3</sup>

So Sir William Scott decreed of a bottomry bond held by an English subject on a ship that became enemy property.<sup>4</sup>

264. *The question occurs whether the authorized exercise of the right of stopping goods in transitu to a neutral, by a belligerent vendor, restores their belligerent character, or those in transitu to a belligerent, by a neutral vendor, restores their neutral character?*

This question does not appear to have occurred in judicial jurisprudence. Judge Duer<sup>5</sup> is of opinion, that *on this right having been duly exercised, before the capture of the goods, they become reinvested with the national character of the consignors*. And this opinion seems to be just, and is impliedly sanctioned by Sir William Scott.<sup>6</sup> Though the right is merely a lien, yet when the party having a lien has taken possession of the subject in virtue of the lien, he is entitled and liable to be treated as proprietor in respect of all other persons than the cestui que trust, that is, the consignee and his representatives, and he or they can only demand redelivery on payment of the price, or an account of the

<sup>1</sup> See *Barker v. Blakes*, 9 East, 283; *Visger v. Prescott*, 5 Esp. 184.

<sup>2</sup> *The Imina*, 3 C. Rob. 167; *The Lisette*, 6 id. 387; *The Trende Sostre*, 6 id. 390, n.; and the same doctrine is asserted by Mr. Pinckney, the counsel, and acquiesced in by C. J. Marshall, in *The Mary*, 9 Cranch, 132. Would it not follow, e converso, that the neutral

character of a ship is not affected by its hypothecation to a belligerent?

<sup>3</sup> *The Frances*, Irving's Claim, 8 Cranch, 418; Mr. C. J. Marshall absent, and Mr. J. Washington dissenting.

<sup>4</sup> *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 id. 24.

<sup>5</sup> 1 Mar. Ins. 433, Lect. 4, s. 30, 31.

<sup>6</sup> *The Constantia*, 6 C. Rob. 321.



proceeds and payment over of the surplus.<sup>1</sup> In case of capture before the countermand of the bill of lading, this lien would be disregarded, as is that of a neutral upon enemy ship or goods. But the countermand of the bill of lading is equivalent to the possession of a pledge. The captor who should take the goods after the countermand, ought to be thereby subrogated to the rights of the consignee.

265. *Whether the owner of a registered ship has a legal insurable interest, without compliance with the provisions of the registry act?*

There is a diversity in the decisions on this question.

The provisions of the British law of registry,<sup>2</sup> and of that of the United States,<sup>3</sup> are similar, the requirement of each being, that the ownership of registered vessels shall be truly stated in the register, and that all transfers shall be minuted in the documentary evidence of the ownership, so as always to exhibit the true state of the ownership; the objects of the legislature of both countries being to encourage domestic ship-building and the home commercial marine, by giving privileges to home-built and home-owned shipping, and the object of these laws can be effected only by such a construction and administration of them as shall prevent vessels not home-built and home-owned from enjoying the privileges granted by the laws.

In pursuance of this policy, Lord Kenyon and the other judges of the King's Bench, in his time, held, that no interest legal or equitable, in registered vessels, could be recognized by the courts of law, whether in a case of insurance, or any other, in favor of the party claiming such interest, unless it appeared in the documentary evidence of ownership.

The case before Lord Kenyon was that of a policy upon a vessel registered in the names of two persons, copartners, who afterwards took two others into copartnership, on an agreement for a joint interest in all the property of the firm, without making any alteration of the register. The policy was for whom it might concern, and the action was in the names of all four copartners.<sup>4</sup>

<sup>1</sup> See *supra*, s. 1, No. 178, as to the right of stopping in transitu, as affecting the sufficiency of the insurable interest.

<sup>2</sup> Stat. 26 Geo. III. c. 60, s. 3.

<sup>3</sup> Act of Congress, 1792, c. 1, s. 14, and 1797, c. 61, s. 2.

<sup>4</sup> *Camden v. Anderson*, 5 Term, 709.

Lord Chancellor Eldon, some twenty years afterwards, 1808, adopted this doctrine in its full extent.<sup>1</sup> But he intimated a doubt, whether the doctrine would apply to every species of equitable interest, as that of assignees in bankruptcy, or that of executors and administrators, where the change of interest takes place by operation of law.

The doctrine thus laid down runs through the English jurisprudence.<sup>2</sup>

In a case of insurance in the name of A, on a ship registered in the name of A and B, on the oath of A to their ownership, Mr. Justice Story held that the assured could not be permitted to show that the ship's papers were false, and the ownership was entirely in himself.<sup>3</sup>

In some of the State courts it has been held, that an interest in a registered ship, as well as in any other chattel, may be transferred by a sale and delivery without writing; as in the Supreme Court of New York,<sup>4</sup> and in the Superior Court of the city of New York.<sup>5</sup> And in a case before the Supreme Court of Massachusetts, a partnership consisting of three partners was permitted to prove its ownership of half of a vessel, registered in the name of one of them, who was credited with such half in the books of the firm, and that of a third person. It was remarked that the register was only *primâ facie* evidence of the ownership.<sup>6</sup>

So it was held that an owner could not avail himself of the omission of his name in the register to avoid a claim for supplies.<sup>7</sup>

The Supreme Court of the United States held, that the omis-

<sup>1</sup> *Yallop, Ex parte*, 15 Ves. 60; *Houghton, Ex parte*, 17 Ves. 253.

<sup>2</sup> *Everth v. Blackburne*, 2 Stark. 66; *Marsh v. Robinson*, 4 Esp. 98; *Campbell v. Stein*, 6 Dow, Parl. Cas. 116; *Rolleston v. Hibbert*, 3 Term, 406, and 4 East, 114; *The Sisters*, 5 C. Rob. 138; 1 id. 155, 438. A mere clerical mistake in such documentary evidence is held not to vitiate the title. *Rolleston v. Smith*, 4 Term, 161.

<sup>3</sup> *Ohl v. Eagle Ins. Co.* 4 Mas. C. C. 172. And see *Jacobsen's Sea Laws*, B. 1, c. 22; *Duncanson v. M'Clure*, 4 Dall. 308.

<sup>4</sup> *Wendover v. Hogeboom*, 7 Johns. N. Y. 308.

<sup>5</sup> *Ring v. Franklin Ins. Co.* 2 Hall, N. Y. 1.

<sup>6</sup> *Bixby v. Franklin Ins. Co.* 8 Pick. Mass. 86. See also, to the same effect, *Lazarus v. Commonwealth Ins. Co.* 5 Pick. Mass. 86; *Hatch v. Smith*, 5 Mass. 53; *Pratt v. Phœnix Ins. Co.* 1 Browne, Penn. 267; *Badger v. Bank of Cumberland*, 26 Me. 428.

<sup>7</sup> *Vinal v. Burrill*, 16 Pick. Mass. 401.

sion to surrender the old register, as required by the act of Congress,<sup>1</sup> did not defeat the policy upon the vessel constructed upon its keel, floor timbers, and naval timbers, and enrolled under a different name.<sup>2</sup>

On the whole, for the reasons given in the above cases, particularly those given by the Supreme Court of the United States, the better doctrine seems to be, that, *in the United States, in the absence of fraud, and of intent to use the ship illegally, the owner of a registered ship has a legal insurable interest in it, though the ownership is not accurately stated in the register.*

266. *The ship-owner is not subject to have the registry laws of his own country alleged against him in the courts of a foreign country, to defeat his insurance on a vessel on the ground of illegality.*<sup>3</sup>

267. *Where the law requires vessels to take a pilot, or forfeit half of the pilotage, the not taking of one is not such an illegality as to avoid the insurance.*<sup>4</sup>

The forfeiture in such case is rather a contribution towards the expense of maintaining a system of pilotage, than a punishment for a misdemeanor. Besides, the delinquency, if it be one, is remote and incidental, and distinct from the interest in the vessel and the risk.

268. It is a general doctrine, that *property held or used, or contracts made in contravention of the commercial regulations of a foreign state, do not vitiate a right or title.*

It is said that one state does not take notice of the revenue laws, or commercial regulations, or municipal laws of another. The doctrine is probably derived from the notion, and to some extent, the fact, that the commercial regulations of different states, though at peace, originate in competition and rivalry.

Again, some countries, Spain and Portugal particularly, have imposed many commercial restrictions, which their own subjects are in the habit of violating, and it would be excessive severity in a government to require of its subjects an exact observance of

<sup>1</sup> Act of 1792, c. 45, s. 14.

<sup>2</sup> Ocean Ins. Co. v. Polleys, 13 Pet. 157.

<sup>3</sup> Rhind v. Wilkinson, 2 Taunt. 237.

<sup>4</sup> Flanigan v. Washington Ins. Co.

7 Penn. St. 307. And see Keeler v. Firemen's Ins. Co. 3 Hill, N. Y. 250.

the laws of any such foreign country, which are disregarded by the people of that country themselves.

In pursuance of this doctrine, a legal insurable interest in goods exported to a foreign country, in contravention of its laws, is recognized by the courts of the country from which they are exported.<sup>1</sup>

269. *The mere knowledge by the foreign vendor of goods, that the purchaser intends to employ them at home in contravention of the laws of trade, will not render the contract void, or prevent the vendor from recovering the price against the purchaser, in the courts of the country of the latter, provided he lends no aid to such contravention.*

As where the goods are intended by the purchaser to be smuggled.<sup>2</sup>

*But if the purchaser, as part of the contract, or transaction, does any act auxiliary to such contravention of law, he cannot set up his contract in the foreign country.*

Goods were exported from England, in the ship Croydon, on the master's giving a bond, required by law, to employ them in trade on the coast of Africa. It had been agreed at Liverpool between the Croydon and the American ship Washington, that, on their arriving on the coast of Africa, the goods should be delivered on board of the latter. They were so delivered, and there employed in trade. It was held that a policy made in England on the Washington, at and from the coast of Africa, was void, on the ground that, in pursuance of a contract made in England, she was employed, in coöperation with the Croydon, in contravention of the British law, and Gibbs, C. J., is reported to have said: "If a foreigner, resident in a foreign country, aids to pack the goods for smuggling, he cannot recover the price of them here."<sup>3</sup>

270. *The law of nations makes it the duty of a nation, professing to be neutral, to abstain from assisting either belligerent to carry on a war, by furnishing soldiers, ships of war, arms, or war-like stores.*<sup>4</sup>

<sup>1</sup> Gardiner v. Smith, 1 Johns. Cas. S. C. 1 Marsh. 119; and see Gibson v. N. Y. 141. Jurisprudence abounds with Mair, 1 Marsh. 39.

<sup>4</sup> Richardson v. Maine Ins. Co. 6

<sup>2</sup> Holman v. Johnson, Cowp. 341. Mass. 114; 1 Maccabees, c. 8, v. 26;

<sup>3</sup> Gibson v. Service, 5 Taunt. 433; Grot. lib. 3, c. 1, s. 5; Vattel, lib. 3, c.



271. *Either belligerent has a right to capture and confiscate all arms, warlike equipments, and military supplies, sent by a neutral to the other. Such trade is denominated contraband of war.*

In determining what particular articles of merchandise are contraband of war, Mr. Marshall says,<sup>1</sup> "much depends on the power of the party, whether belligerent or neutral," who is deciding the question. A belligerent, possessing a powerful naval force, has an interest in making the list of contraband articles numerous. "Ship-timber, going to a port of naval equipment,"<sup>2</sup> pitch and tar,<sup>3</sup> sail-cloth,<sup>4</sup> hemp fit to be used in equipping ships,<sup>5</sup> sheathing-copper,<sup>6</sup> a ship, intended to be sold for the purpose of being used as a privateer,<sup>7</sup> and also provisions of a kind commonly used as sea-stores, destined to a port of naval equipment,<sup>8</sup> have been adjudged by Sir William Scott to be contraband of war.<sup>9</sup>

272. Vattel<sup>10</sup> says, that *provisions may be contraband of war, if destined to a place which one of the contending parties is attempting to reduce by famine.* The writers on the continent of Europe generally maintain that provisions are not contraband of war, unless destined to a place besieged or blockaded.<sup>11</sup>

*In respect to this article, and also cloth, hemp, saddles, harnesses, and other articles used for ordinary purposes of necessity, convenience, or luxury, as well as in military and naval equipments, their character, as contraband of war or not, depends upon the place to which they are destined. If they are going to a belligerent port, where articles of the same kind are used for warlike purposes, they may be contraband of war.*<sup>12</sup>

7, n. 103, 104. See also Robinson, Col. Mar. 54, 63, 123, 184.

<sup>1</sup> 2d ed. p. 78.

<sup>2</sup> The Endraught, 1 C. Rob. 19.

<sup>3</sup> The Sarah Christina, 1 C. Rob. 237; The Twee Juffrowen, 4 id. 242; The Richmond, 5 id. 325.

<sup>4</sup> The Neptunus, Hempel, 2 C. Rob. 110.

<sup>5</sup> The Gute Gesellschaft Michael, 4 C. Rob. 94.

<sup>6</sup> The Charlotte, 5 C. Rob. 275.

<sup>7</sup> The Richmond, 5 C. Rob. 325; The Brutus, 5 C. Rob. 331, n. and App. No. I.

<sup>8</sup> The Jonge Margaretha, 1 C. Rob. 189; The Ranger, 6 id. 125.

<sup>9</sup> See 1 Duer, Mar. Ins. 623-644, Lect. 7, s. 1-19.

<sup>10</sup> Lib. 3, c. 7, s. 112.

<sup>11</sup> 2 Val. 264, tit. Des Prises, a. 11.

<sup>12</sup> The Jonge Margaretha, 1 C. Rob. Adm. 189; The Frau Margaretha, 6 id. 92; The Zelder Rust, 6 id. 93; The Haabat, 2 id. 174; The Ranger, 6 id. 125; The Edward, 4 id. 68; Maisonaire v. Keating, 2 Gall. C. C. 325.

Provisions intended for naval supplies transported from one port of a belligerent to another, the latter being a port of naval equipment,<sup>1</sup> or from one neutral country to another, to supply the fleet of one of the belligerents lying in the port of destination,<sup>2</sup> are well settled to be contraband.<sup>3</sup>

273. The well-established doctrine is, that *supplies adapted, and evidently intended, to be applied at the belligerent port of destination, for warlike use in the land or naval service, are contraband of war.*<sup>4</sup>

The principle universally acknowledged respecting the necessity of notice to neutrals of a blockade, shows that a neutral cannot legally be made subject to surprise as to what is contraband of war. No article can be so, unless notice and knowledge can be imputed to the neutral, that it is DIRECTLY applicable, and probably to be directly applied, to purposes of military or naval warfare, at the port of destination. In determining in each case what articles are so applicable, and what is reasonable notice that they will be so applied, the tribunal having jurisdiction needs to be sternly guarded against the national predilections, which are, in many respects, not only excusable, but laudable.

274. *Neutral goods, documented as such, with neutral insignia, on board of a merchant-vessel of one belligerent, are not legally subject to capture by the other belligerent.*<sup>5</sup> But goods on board of a vessel of a belligerent nation are presumed to have its national character, unless they are otherwise documented.<sup>6</sup>

275. *Neutral goods documented with a belligerent character, are subject to be treated as belligerent property.*<sup>7</sup>

276. *Every kind of property belonging to the subject of a neutral state, destined to a blockaded port, or besieged town, is contraband of war.*<sup>8</sup>

277. *Where a neutral is concerned in the trade of one belligerent*

<sup>1</sup> The *Edward*, 4 C. Rob. Adm. 68.

<sup>6</sup> The *London Packet*, 1 Mas. C. C.

<sup>2</sup> The *Commercen*, 1 Wheat. 382; 14.

S. C. 2 Gall. C. C. 264.

<sup>7</sup> The *Princessa*, 2 C. Rob. Adm.

<sup>3</sup> See also *Maisonairé v. Keating*, 2

49.

Gall. C. C. 325.

<sup>8</sup> 2 Val. 264, tit. Des Prises, a. 11;

<sup>4</sup> Ibid.

Robinson Col. Mar. 158.

<sup>5</sup> The *Catharina Elizabeth*, 5 C. Rob.

Adm. 232.

*erent, that is in its nature invested with a national character, his property so employed is, as already stated, subject to be dealt with by the other belligerent as enemy property.*

As in the case of the interest of a neutral in a house established in one of the belligerent countries, and trade under a special privilege granted by a belligerent.<sup>1</sup>

278. This general doctrine gives rise to the much-vexed question, *Whether the trade between a belligerent and its colonies, from which other nations had been excluded before a war, and were only admitted to it during the war on account of the exposure of the belligerent's own vessels and property to capture by the other belligerent, is subject to be treated by the other belligerent as a privileged trade of the enemy, and to capture and condemnation as such?*

In the wars growing out of the French revolution of 1789, and during the reign of Napoleon, the trade between France and its colonies was thrown open to neutrals. American merchants went into this trade, and their property, the produce of the French colonies, was captured and condemned by the English, in great amounts. The American government strongly protested against the doctrine upon which these condemnations proceeded, and still more decidedly, and with good reason, against a new modification of the doctrines of national law, as this was, being sprung upon the American merchants without a formal, explicit notice; and the dissatisfaction with those decisions was no doubt one among the causes of the war between the United States and England in 1812.

This question is elaborately examined by Judge Duer.<sup>2</sup>

*That such a trade, opened to all neutral nations indiscriminately, is not to be treated as contraband by the other belligerent without previous official notice from such other belligerent, results palpably from the doctrines above stated and not disputed.*

<sup>1</sup> Supra, No. 253.

<sup>2</sup> 1 Mar. Ins. 699-725, Lect. 8, s. 1-10. See *The Immanuel*, 2 C. Rob. Adm. 186; *The Convenientia*, 4 id. 201; *The Essex*, 5 id. 369; *The Johanna Tholen*, 6 id. 72; *The Jonge Thomas*, 3 id. 233; *The Polly*, 2 id. 361; *The Providentia*, 2 id. 142; *The Rebecca*, 2 id. 101;

*The Phœnix*, 5 id. 20; *The Rose*, 2 id. 206; *The Rendsborg*, 4 id. 121; *The Welvaart*, 1 id. 122; *The Wilhelmina*, 4 id. App. 4; *The Minerva*, 3 id. 232; *The Thomyris*, Edw. Adm. 17; *Wait's American State Papers*, 1806, and subsequently; *Berens v. Rucker*, 1 W. Blackst. 313; *Vasse v. Ball*, 2 Dall. 270.



Sir William Scott acknowledged as much, for he alleged decrees of his own as a sufficient notice. But this has been considered, in this country at least, to be an extreme assumption of belligerent privilege.

It is not easy to lay down any general rule whereby to discriminate the circumstances under which such a trade can justifiably be treated by a belligerent as privileged by the enemy.

279. *The contraband character attaches to goods at the commencement of the voyage.*<sup>1</sup>

280. *A contraband character does not attach to goods or funds intended for the purchase of contraband goods, nor to the proceeds of the contraband articles.*

281. *The vessel, and the property of the owners on board, are liable to forfeiture for contraband trade during the passage on which such trading is attempted or done, and until arrival to the next subsequent port of delivery or loading after that of its then destination.*

The admiralty decisions usually state the liability to continue at least to the end of the same or subsequent "voyage" or adventure; but since this may include divers passages, and be prolonged almost indefinitely, I venture to state the doctrine in the above form as being more definite, and as answering better to the grounds alleged by the admiralty tribunals in determining the period during which the liability to seizure or capture continues.<sup>2</sup>

<sup>1</sup> The Imina, 3 C. Rob. Adm. 167.

<sup>2</sup> See *The Christianberg*, 6 C. Rob. Adm. 376; *The Randers Bye*, 3 id. 382, n.; *The Nancy, the Widow Black & Co. claimants*, 3 id. 122; *The Rosalie and Betty*, 2 id. 343; *The Rosalia and Elizabeth*, 4 id. note to table of cases; *Parkman v. Allen*, 1 Stair, Dec. 29; S. C. 6 C. Rob. Adm. 382; *The Marguerette*, 1 Act. Cas. 333; *The Joseph*, 8 Cranch, 451, 1 Gall. C. C. 545; *Carrington v. The Merchants' Ins. Co.* 8 Pet. 495; *Kent's Com.*, 5th ed. 151, n., 1 Duer, Mar. Ins. 627, Lect. 7, s. 8, n. Mr. Wheaton is of opinion that the liability ought to cease on the

termination of the pending passage. *Digest of Law of Capture*, p. 183, and *International Law*, Vol. II. p. 219.

Some of the earlier of the above cases do not go to the extent of the doctrines stated in the text. In the later decisions of Sir William Scott, the period of the liability of a neutral vessel to capture, on account of unneutral trading or conduct in a passage in the course of an East India voyage, comprehending divers passages and ports of loading and discharge, is very much prolonged. The principle on which the limitation of the right of subsequent capture is put, is, that the



282. *Trade by a neutral in articles contraband of war exposes the property involved in it to capture and condemnation by a belligerent, but it is not a violation of the duty which he owes to the law of his own country.*<sup>1</sup>

Chief Justice Parsons says: "We know of no case where a neutral merchant has been punished by his own sovereign for his contraband shipments."<sup>2</sup> He says there is no distinction in this respect between an interloping trade, and a trade in articles contraband of war, and the same opinion seems to be entertained in New York;<sup>3</sup> and it is universally held to be no violation of the laws of one country for its subjects to carry on an interloping trade in another. It is said, that this right of the neutral to evade a blockade, and to trade in articles contraband of war, is similar to his right to transport the goods of a belligerent, which the other belligerent may seize, and he may detain and carry the neutral vessel into port for the purpose of making a seizure of the goods. That is to say, either trade may be prosecuted by a neutral, and it is no violation of the laws of his own country or that of nations. He merely incurs the peril of forfeiting the goods in

forfeiture is not cancelled until the belligerent may have had an opportunity to enforce his right. To the objection that "if the penalty is applied to the subsequent voyage, it may travel on with the vessel forever," Sir William Scott remarked, in 1807, "In principle, perhaps, it might not unjustly be pursued further than the immediate voyage, but it had not been carried further than the voyage succeeding." The right to enforce the penalty at any subsequent period, after sundry subsequent voyages, and sales of the subject, and treaties of peace, is thus disclaimed for Great Britain, so far as the authority of its admiralty courts goes, but since it is left in the discretion of the courts to determine how many successive passages and changes of cargo are to be included in the two voyages, the limitation of the period within which the forfeiture may be exacted, remains

quite indefinite, and presents a proper subject for international legislation by treaty.

In the above-cited case of *The Joseph*, the Supreme Court of the United States condemned an American ship which, after notice of the war of 1812, with England, took a cargo at St. Petersburg for England under a British license, and was captured on the passage thence in ballast to the United States, the defence being a necessity to take freight under the license, in order to raise funds to pay the expense of repairs at St. Petersburg.

<sup>1</sup> *Depeyster v. Gardner*, 1 Caines, N. Y. 492.

<sup>2</sup> *Richardson v. Maine Ins. Co.* 6 Mass. 113.

<sup>3</sup> *Seton v. Low*, 1 Johns. Cas. N. Y. 1; *Skidmore v. Desdoity*, 2 id. 77; *Juhel v. Rhineland*, 2 id. 120 and 487.

case of their being seized by a belligerent in one case, or the government whose laws he violates in the other.<sup>1</sup> Such trade is accordingly a legal subject for insurance.

283. *Fitting out a privateer by neutrals in a neutral port, to cruise under a flag of one belligerent against the other, is illegal, and accordingly a contract made in pursuance and as a part of such enterprise is void.*<sup>2</sup>

284. *The trading in articles contraband of war has, in some instances, been punished, by Sir William Scott, as an offence against the law of nations, by condemning, not only the specific goods, but also other goods belonging to the same shipper, and the ship in which the goods were carried,*<sup>3</sup> *or by refusing to allow freight,*<sup>4</sup> *in cases which he considered as attended with circumstances of great aggravation. This was, however, to say the least, a strong construction of international law in favor of the belligerent, and assuming a large latitude of discretionary jurisdiction, and privilege of animadversion and right of inflicting mulcts, in respect of neutrals.*

285. *Resistance by a neutral to search, rightfully demanded and made by a belligerent, subjects property to confiscation, since such resistance is an infraction of an international law, the observance of which is essential to the maintenance of maritime police.*<sup>5</sup>

### SECTION III. INTEREST OF THE OWNER OF PROPERTY MORTGAGED, PLEDGED, OR SUBJECT TO A LIEN.

286. *The owner of property mortgaged, pledged, or subject to a lien, still retains an insurable interest in it to the full value.*<sup>6</sup>

<sup>1</sup> See *The Santissima Trinidad*, 7 Wheat. 283.

<sup>2</sup> *Pond v. Smith*, 4 Conn. 217.

<sup>3</sup> *The Staat Embden*, 1 C. Rob. Adm. 26, and note; *The Jonge Tobias*, 1 id. 329; *The Sarah Christina*, 1 id. 237; *The Ringende Jacob*, 1 id. 89; *The Edward*, 4 id. 68; *The Ranger*, 6 id. 125.

<sup>4</sup> *The Mercurius*, 1 C. Rob. Adm. 288.

<sup>5</sup> *The Dispatch*, 3 C. Rob. Adm. 278; *The Graaf Bernstoff*, 3 id. 109.

<sup>6</sup> *Traders' Ins. Co. v. Robert*, 9 Wend. N. Y. 474; *Carpenter v. Washington Ins. Co. of Providence*, 16 Pet. 495, 4 How. 185; *Stetson v. Mass. Mut. Fire Ins. Co.* 4 Mass. 330; *Strong v. Manuf. Ins. Co.* 10 Pick. Mass. 40; *Smith v. Lascelles*, 2 Term, 187; *Higginson v. Dall*, 13 Mass. 96. See also *Allston v. Campbell*, 4 Brown, Parl. Cas. 476;

The assignment of a bill of lading passes the entire and absolute property in the goods to the assignee, where this is the intention of the party making the assignment;<sup>1</sup> but if the bill of lading is assigned merely for the purpose of binding a consignment of the goods, and designating the person to whom the proceeds are to be paid over, such person being a creditor of the consignor, the consignor still retains an insurable interest, since he continues to be as directly interested in the safety of the goods, as before assigning the bill of lading.<sup>2</sup>

A quantity of fish being shipped by Locke, upon which Barnard had advanced money, and to secure payment had taken a bill of lading, and made out the invoice, in his own name; it was held that Locke still had an insurable interest in the full value.<sup>3</sup>

A purchaser under a decree of sale of mortgaged premises has an insurable interest, though the decree has not been enrolled.<sup>4</sup>

287. *In case of a debtor's assigning property to be disposed of, and the proceeds applied to the payment of his debts, he still has an insurable interest in the property to its full value, so long as his debts, to discharge which the property is assigned, remain in force against him, and unsatisfied and unreleased, or there is a surplus to accrue to him.*<sup>5</sup>

A steamboat insured in the name of the owner, the loss to be payable to the agents by whom the policy was procured, was assigned by the owner among his other effects for the benefit of his creditors, with a resulting trust for his own benefit after the creditors should be fully paid, the creditors at the same time giving an absolute release and discharge of their demands; and, after the assignment, the steamboat was lost. It appearing that the property assigned was sufficient to pay the creditors and leave a surplus equal to the value of the steamboat, it was held that the assured still had an insurable interest in her to her full value, equivalent to that of a mortgager or cestui que trust.<sup>6</sup>

Williams's Adm. v. Cincinnati Ins. Co.  
1 Ohio, 542.

1 M'Andrew v. Bell, 1 Esp. 373;  
Holt, 572.

2 Hibbert v. Carter, 1 Term, 745.

3 Locke v. The North American Ins.  
Co. 13 Mass. 61.

4 McLaren v. Hartford F. Ins. Co.  
5 N. Y. 151. See also Leland v. Ship  
Medora, 2 Woodb. & M. C. C. 92.

5 Gordon v. Mass. Fire & Marine  
Ins. Co. 2 Pick. Mass. 249.

6 Lazarus v. Commonwealth Ins. Co.  
19 Pick. Mass. 81; S. C. 5 Pick. Mass.  
76.



## SECTION IV. INTEREST OF A MORTGAGEE, TRUSTEE, OR IN VIRTUE OF A LIEN.

288. *A trustee has, as such, an insurable interest in the trust property to its full value.*<sup>1</sup>

289. *A mortgagee has an insurable interest in the mortgaged property*<sup>2</sup> *to the amount of his claim.*

A person to whom the freight of a vessel has been mortgaged, may insure the legal interest on his own account, and also the equitable interest on account of the mortgager.<sup>3</sup>

A vessel going down the St. Lawrence sustained damage rendering repairs necessary, and, to raise funds to make the same, the master mortgaged the vessel as security for his bills on the owners and ordinary interest. Assuming that the circumstances authorized the master to raise the funds in this way, Mr. Baron Platt thereupon rightly ruled, that the lenders had an insurable interest to the amount advanced. But Jervis, C. J., and his associates, Cresswell, Williams, and Talfourd, of the English Common Pleas, on the case coming up, held that the master had not, in his capacity as such, authority to pledge the vessel, and at the same time bind his owners personally for advances, though necessary for repairs.<sup>4</sup>

<sup>1</sup> Page v. Western Ins. Co. 19 La. 49.

<sup>2</sup> Traders' Ins. Co. v. Robert, 9 Wend. N. Y. 404; Carpenter v. Washington Ins. Co. of Providence, 16 Pet. 495; S. C. 4 How. 185; Kernochan v. New York Ins. Co. 17 N. Y. 428.

<sup>3</sup> Yallop, Ex parte, 15 Ves. jun. 60; Houghton, Ex parte, 17 Ves. jun. 253.

<sup>4</sup> Stainbank v. Fenning, 11 C. B. 51; 6 Eng. Law & Eq. 412. See also Smith v. Plummer, 1 Barnew. & Ald. 575; The Augusta, 1 Dods. Adm. 283; The Rubicon, 1 Hagg. Adm. 13; The Trident, 1 W. Rob. Adm. 33; Beldon v. Campbell, 6 Exch. 886; 6 Eng. Law & Eq. 472, overruling Richards v. Lyall, 7 Price, Exch. 592. See Abbott, Ship-

ping, part 2, c. 3, and notes by Story. Also The Hunter, Ware, Dist. Ct. 249.

It is held by Peters, J., in Gardner v. Ship New Jersey, 1 Pet. Adm. 223, that the master himself has a lien on the proceeds of the ship in an admiralty court, and also a claim upon his owners for moneys necessarily expended by him abroad, which is surely an equitable doctrine, and affords a ground to infer his authority to give to another such lien and claim, contrary to the doctrine of the English courts of common law just cited, that go absolutely to deny the master authority in any case to mortgage the ship, a mortgage being, by its essential character, collateral to a debt or obligation of the owner.



By the British registry act,<sup>1</sup> the ownership of a mortgagee is distinguished in the register from the absolute ownership. In a case decided in the Court of King's Bench, since the passing of that statute, a mortgagee of a ship whose lien amounted to £900, effected insurance to the amount of £3700 in two policies, in each of which the ship was valued at £3000, and the whole amount insured in both policies was paid to the assured; and one set of underwriters, after learning that another policy had been made, brought an action to recover back their proportion of the excess of the amount paid for the loss, over that which the mortgagee had a right to recover on the two policies. The court held, that, unless it appeared that the insurance was intended to cover the whole value of the vessel, the assured was only entitled to recover (and accordingly in this case could only retain) the amount of his lien.<sup>2</sup>

290. *A mortgage or other pledge of property as security against a contingent liability, gives an insurable interest to the party to whom it is so transferred, to the amount of his liability.*

It was so held in case of the transfer of a ship and cargo to a party who had given a bond to answer to a decree which might be given in a superior court on appeal by the captors. On total loss and abandonment, he recovered against his underwriters.<sup>3</sup>

291. *Where goods are consigned by a debtor with orders to the consignee to pay the proceeds to his creditor, without any agreement between the debtor and creditor to that effect, the creditor has an insurable interest in the goods.*<sup>4</sup>

The bill of lading of goods being assigned by the consignee as security for advances, the lender has an insurable interest in the goods.<sup>5</sup>

292. *A creditor, having a lien on property, has an insurable interest to the extent of his lien.*<sup>6</sup>

293. *A trustee as he has a legal interest in the thing may insure,*<sup>7</sup>

<sup>1</sup> Stat. 6 Geo. IV. c. 110, s. 45.

<sup>2</sup> *Irving v. Richardson*, 2 Barnew. & Ad. 193.

<sup>3</sup> *Russell v. United Ins. Co.* 4 Dall. 421; S. C. 1 Wash. C. C. 409.

<sup>4</sup> *Hill v. Secretan*, 1 Bos. & P. 315.

<sup>5</sup> *Sutherland v. Pratt*, 12 Mees. & W. Exch. 16; S. C. 11 id. 296.

<sup>6</sup> *Wells v. Philadelphia Ins. Co.* 9

Serg. & R. Penn. 103; *Burbank v. Rockingham Ins. Co.* 24 N. H. 550; this was a mechanic's lien; *Franklin Ins. Co. v. Coates*, 14 Md. 285.

<sup>7</sup> 5 Bos. & P. 324.

and represent the property to be his own, and the policy may be *in his own name*.<sup>1</sup>

So Lord Kenyon was of opinion, that an executor, who, as such, and accordingly as trustee, held an annuity bond, thereby had an insurable interest.<sup>2</sup> And Lord Ellenborough says, he may insure before probate of the will.<sup>3</sup>

294. *Property being sold, with condition that it shall remain as collateral security to the vendor, he still has an insurable interest to the amount of his demand.*<sup>4</sup>

295. *The interest of the mortgagee being in its essential character conditional, the beneficial interest in the policy effected by him on the mortgaged subject should be considered so also.*

A loss having been paid on a share in a vessel mortgaged on an agreement that it should be at the risk of the mortgager as to all "losses not covered by insurance," and insured "by the mortgagee for the owners," and the debt paid and vessel thus redeemed, it was rightly held in Maine, that the mortgagee was thereupon accountable to the mortgager for the net proceeds of the insurance,<sup>5</sup> since the policy was expressed to be for the benefit of both the mortgagee and mortgager.

296. *A policy, made by order of the mortgager, does not enure to the benefit of the mortgagee or pledgee unless it is expressed to be for his benefit, and authorized or adopted by him, or is assigned to him by a valid assignment.*

Some sugars were sold at Norfolk, in Virginia, upon an agreement that the supercargo should be trustee for the parties, to hold and apply the proceeds to secure the payment of the bills drawn on London, by the purchaser, in favor of the vendor for the price, namely, £27,201. The purchaser ordered his correspondents in London, on whom he had drawn bills for the price, to make insurance, which they did, to the amount of £35,000, to cover the first cost and premium. They did not accept the bills. The sugars were lost on the voyage by capture, and the underwriters paid a total loss to the London firm on whom the bills were

<sup>1</sup> Pratt v. Phœn. Ins. Co. 1 Browne, Penn. 267.

<sup>4</sup> Vairin v. Canal Ins. Co. 10 Ohio St. 561; Norcross v. Insurance Co. 17 Penn. St. 429.

<sup>2</sup> Tidswell v. Ankerstein, Peake, 151.

<sup>3</sup> Stirling v. Vaughan, 11 East, 619;  
<sup>5</sup> 2 Campb. 35.

<sup>5</sup> White v. Mann, 26 Me. 361.

drawn. They paid a great part of the bills, but there remained a balance due on them. The remainder of the amount received from the underwriters they had paid over to their principal, the purchaser of the sugars, who became bankrupt. No agreement appears to have been made, that the policy, as well as the sugars themselves, should be pledged as security for the payment of the bills. The agents who effected the policy on the order of the purchaser, were held not to be answerable to the administrator of the vendor, for the money received from the underwriters, to the amount of the deficiency for payment of the bills.<sup>1</sup> The case turns upon the express or implied agreement of the agents to apply the money received to the discharge of the bills. They had studiously avoided making any such express agreement. No notice is stated in the case. It appears very probable, however, from the statement of the case, that the agents knew that the sugars and proceeds were so pledged. The case accordingly admits of the construction, that a policy of insurance made by the order, and on behalf, of the pledger, on goods pledged to the full value, does not follow the pledge.

297. *A payment by the insurers to a mortgagee for damage to the mortgaged premises by fire, under a policy originally made in favor of the mortgager, and by him assigned to the mortgagee, as collateral security for the debt, is so far satisfaction of the debt.*<sup>2</sup>

#### SECTION V. INTEREST OF A LENDER IN BOTTOMRY AND RESPON- DENTIA, AND UNDER A SALE BY THE MASTER.

298. *A marine hypothecation is a maritime contract whereby the owner or his agent pledges his ship or goods as security for a debt accruing on account of advances or other consideration, and payable on condition of the subject being safe, or in proportion or to the amount of the part of it saved, from the marine perils specified in the contract.*<sup>3</sup>

The lender or creditor, in consideration of the stipulated rate

<sup>1</sup> *Neale v. Reid and Irving*, 1 Barnew. & C. 657.

<sup>2</sup> *Robert v. Traders' Ins. Co.* 17 Wend. N. Y. 631.

<sup>3</sup> See definition of Pothier, *Contrat a La Grosse*, No. 1, cited by Boulay, *Droit Com.* tit. 9, s. 1, tom. 3, p. 6, ed. 1822.

of interest, which being above the common rate is called MARINE INTEREST, takes upon himself certain perils and losses, as of capture, the seas, &c., or all perils and losses usually insured against, or all perils and losses whatsoever. If the pledged subject is lost by such perils, the debt is thereby cancelled. Or, by some contracts, if a partial loss so happen, a corresponding part of the debt is cancelled. Such pledge of a vessel is denominated BOTTOMRY, that is, a pledge of the vessel's bottom; and such a pledge of the cargo is RESPONDENTIA. The contract is usually made by an instrument under seal, called a BOTTOMRY OR RESPONDENTIA BOND; or if both ship and cargo are pledged in the same instrument, a "Bottomry AND Respondentia Bond." The hypothecated ship or cargo remains in possession of the borrower, subject to be taken possession of, under admiralty process, by the lender, on forfeiture, and sold for satisfaction of the debt. Though his right may be forfeited by negligence.<sup>1</sup>

299. *A bottomry and respondentia bond is, in some respects, similar to a mortgage, and, like it, vests an insurable interest in the lender or creditor.*

The property pledged is not put into the possession of the lender, as in the case of a mortgage. Mortgaged property is also at the risk of the mortgager, but in bottomry, or respondentia, the lender stands in the place of the insurer.

300. *There is greater reason why the lender on bottomry and respondentia should have an insurable interest in the thing pledged, than that a mortgagee should have such an interest; for, if the property is lost, he loses his debt, whereas a mortgagee still has his claim subsisting against his debtor. It has always been held that the lender has an insurable interest in the ship or goods hypothecated.*<sup>2</sup>

301. *The insurable interest of a party, to whom property is hypothecated, will depend upon the validity of the hypothecation.*

The master, merely as such, without authority or ratification otherwise expressly or impliedly given by the owner, can make a valid hypothecation of the vessel only when he is at so great a

<sup>1</sup> Blaine v. The Charles Carter, 4 S. C. 2 Caines, Cas. N. Y. 110; 1 Emer. Cranch, 328. 237, c. 8, s. 11; Kenny v. Clarkson, 1

<sup>2</sup> Harman v. Vanhatton, 2 Vern. 717; Johns. N. Y. 385; Glover v. Black, 3 Williams v. Smith, 2 Caines, N. Y. 13; Burr. 1394; 1 W. Blackst. 432.



distance from the owner that it is not practicable, or is plainly inexpedient and unreasonable to delay for instructions from him, and then only in case of necessity to obtain funds in order to save the vessel or prosecute the voyage, and only in case of its satisfactorily appearing, under the circumstances, to be a suitable way of obtaining the funds.<sup>1</sup> The master cannot hypothecate to a part owner for advances.<sup>2</sup> His authority to hypothecate or sell the cargo is still more restricted.<sup>3</sup> Accordingly no insurable interest is derived under the master's hypothecation or sale of the ship or cargo not authorized by the circumstances.<sup>4</sup>

In regard to an hypothecation of the cargo by the master, a question arose in one case, whether, if there be specie and other cargo on board, he must first apply the specie not belonging to his owners, before hypothecating the cargo not belonging to them. Mr. Justice Story says: "I am not prepared to say there is any absolute rule, which compels the master at all events, and under all circumstances, to make use of the moneyed coin of third persons, which he happens to have on board, in preference to all other modes of proceeding. There may be cases in which the use of the money would be the greatest sacrifice that could be made, and the whole object of profit in the voyage would be thereby defeated. In all cases much must be left to the master's discretion, and if he acts *bonâ fide*, and with reasonable care, the rights of the parties are bound by his acts."

302. In the same case, Mr. Justice Story says: "If the master has money of his own on board, sufficient for the ship's necessities, it is by no means certain that he has a right in such case to resort to the extraordinary measure of bottomry."

<sup>1</sup> See *infra*, No. 1561, 1565, 1566, 1569; also *Beldon v. Campbell*, 6 Exch. 886, 6 Eng. L. & Eq. 472, overruling *Robinson v. Lyall*, 7 Price, Exch. 592; *The Nuova Loanese*, per Lushington, V. C. 17 Eng. Jurist, 263; *Stainbank v. Shepard*, 20 Eng. L. & Eq. 547. The French law is similar. *Boulay Paty*, *Com. Droit* tit. 9, s. 4, tom. 3, p. 44, ed. 1822.

<sup>2</sup> *Patton v. Randolph*, Gilp. Dist. Ct. 457.

<sup>3</sup> See *infra*, No. 1552, 1561, 1565, 1566.

<sup>4</sup> An hypothecation by the consul was held by Dr. Lushington to be valid, the ship being rightfully in his control, and the appointment of the master being at the same time within his authority. *The Cynthia*, 20 Eng. L. & Eq. 623; S. C. 6 Eng. Jur. Adm. 749.

“ Though I would not absolutely decide that under no circumstances he could so resort where he has sufficient money of his own on board; yet, if he can, it must be a case of very peculiar character, and such as ought to induce the court to uphold it upon great public principles.”<sup>1</sup> But *in case of there being money of the owner of the ship on board*, it is very clear that *the master cannot bottomry*.

Dr. Lushington, J., High Court of Adm. says: “ The common law formerly went almost to the extent, that the master could not, under any circumstances whatever, sanction the sale of a ship abroad. I take the law now to be, that, where an urgent necessity exists, which the master cannot meet, it is competent to him to sell the vessel.”<sup>2</sup>

If the master has no funds, and can obtain credit only on extremely exorbitant terms, if the hypothecation of ship and pending freight do not suffice, he may hypothecate the cargo; and if none of these resources will afford the necessary relief, and the property cannot safely, or except by exorbitant sacrifice, be preserved until he can communicate with his owners, or their agents, or some one who might give him aid, then he is authorized by necessity to sell both ship and cargo.<sup>3</sup>

303. *The sale of the vessel by the master in a foreign port does not defeat a prior bottomry bond, nor exonerate the ship from the lien of the seamen for wages, even for those of a prior passage, where the shipping-paper provides for postponement of payment until return to the home port;*<sup>4</sup> and the insurable interest of the different parties will be affected accordingly.

Thus, where the master sold his vessel at Bahia, it was held to be still subject to a previous bottomry bond on returning to England.

Where the sale is by decree of a competent tribunal, the effect may be different as to prior liens, as the court is presumed “ to have protected the purchaser, as far as the law will allow, against all claims in the nature of a lien.”<sup>5</sup>

<sup>1</sup> Ship Packet, Barker, master, 3 Mas. C. C. 255. 641. See also chapter on Total Loss and Abandonment, *infra*.

<sup>2</sup> The Catharine, 1 Eng. L. & Eq. 679; S. C. 16 Eng. Jur. 231.

<sup>3</sup> See The Bonaparte, 3 W. Rob. Adm. 298; S. C. 1 Eng. L. & Eq.

<sup>4</sup> The Louisa Bertha, 4 Eng. L. & Eq. 665.

<sup>5</sup> The Catharine, 1 Eng. L. & Eq. 679.

304. *A bottomry bond may stipulate for a very high rate of interest without being thereby rendered void.*

305. A bottomry bond for a voyage from Quebec to London, at marine interest of 25 per cent., was held by Sir William Scott not to be void on account of the exorbitancy of the rate of interest.<sup>1</sup>

306. *A bottomry bond may be good in part and bad in part, as a lien*, where a part of the money borrowed by the master, for which the hypothecation was made, was borrowed by him without sufficient authority.

"Courts of admiralty," says Mr. Justice Story, "act ex æquo et bono, as courts of equity, and a bottomry bond may be held good in part and bad in part. So far as the money was properly advanced, it may be held to give a valid lien, and be dismissed as to the rest. If the premium has been unduly inflated, by reason of the master's necessities, the court may moderate it."<sup>2</sup> In such case, accordingly, the insurable interest will be commensurate with the validity of the bond.

The bottomry includes freight depending on the voyage and the next subsequent one, in preference to other claims, unless it is forfeited by negligence.<sup>3</sup>

#### SECTION VI. INTEREST OF A BORROWER IN BOTTOMRY AND RESPONDENTIA.

307. *The borrower on bottomry or respondentia may have an insurable interest in the property pledged, no less than a mortgager, but with this distinction, that the mortgager remains liable the whole loss upon the goods; if they are lost, no part of his debt is discharged; whereas, if the hypothecated ship or goods are lost, the borrower is discharged from his debt. If, therefore, goods are hypothecated for the full value, the borrower is not interested in their safety, as far as the risks are assumed by the lender; for if they are saved, they go to satisfy the debt; if they are lost by the risks, within the hypothecation, he is discharged from the debt.*

<sup>1</sup> *White v. Ship Dædalus*, 1 Stu. Low. C. 130.

<sup>2</sup> *Ship Packet, Barker, master*, 3 Mas. C. C. 255.

<sup>3</sup> *The Jacob*, 4 C. Rob. Adm. 245.

*He is accordingly interested only so far as the value of the property exceeds the amount for which it is pledged.*

It has accordingly been decided, that the owner of a vessel bottomried for more than its full value, has no insurable interest, in respect to the perils assumed by the lender.<sup>1</sup>

308. *Nothing, however, prevents the parties to an hypothecation from agreeing that the lender shall assume only the sea-risks or the risk of capture. In such case the borrower would still retain an insurable interest in the property, to its full value, in relation to the risks not assumed by the lender.*

#### SECTION VII. INTEREST OF A CONSIGNEE, FACTOR, AGENT, OR CARRIER.

309. A distinction is to be kept in mind between the agents' insurable interest, and his authority to insure for his consignor or other principal.

*A consignee, factor, or agent, having a lien on goods, to the amount of his advances, acceptances, and liabilities, stands in this respect precisely in the situation of a mortgagee.*

A debt is due to him from his principal, for which he holds the property as collateral security, and the property is at the risk of the principal, as the debt would still subsist, though the property should be lost; and the excess over the proceeds of the goods would be still due to him, in case of the proceeds being insufficient to satisfy his claims. *He has therefore an insurable interest in the goods to the amount of his lien.* And whether the lien arises from expenses and charges on account of the specific goods, or is a general balance, can make no difference; if the lien exists, it involves an insurable interest. A consignee or factor has not, as such, in all cases, an insurable interest on his own account in the property to its full value; his interest is only commensurate with the loss he may sustain by the destruction of the property; it is

<sup>1</sup> Williams v. Smith, 2 Caines, N. Y. goods bound on an East India voyage, 13; S. C. 2 Caines, Cas. N. Y. 119. to "the value of his interest in the ship, or in the goods on board, exclusive of the money so borrowed." The statute of the 19th Geo. II. c. 37, limits the insurable interest of the owner of an hypothecated ship or



limited to the extent of the lien he has, or will have, when the property comes into his hands.<sup>1</sup>

310. *A commission merchant, to whom goods are consigned for sale, has an insurable interest to the amount of his commissions on the sale, from the time of the goods being consigned to him. He may make insurance in anticipation of the consignment, and the policy will take effect on the consignment being made, and the goods becoming subject to the risks insured against.*<sup>2</sup>

311. *There are various sorts of consignees, agents, and factors, some having authority to sell the property, others to take possession of it only. Nor is it settled that all persons, who may make something by selling or keeping property, or contracting in regard to it, have therefore an insurable interest.*

It is questionable whether a broker, employed to sell a house, would have an insurable interest in it to the amount of his commissions. If an agent or consignee has a subsisting demand, for which the property is pledged, or will become so on its coming into his hands, the principal having in the latter case consigned it to him, or otherwise having given him a right to take possession of it, he unquestionably has an insurable interest.

A supercargo who is to receive a compensation out of the homeward cargo, as he begins to render his services at the commencement of the voyage and so continues, sustains an absolute loss of his time and skill in case the cargo does not arrive. An insurance upon his interest is, therefore, strictly a contract of indemnity. And it is held, in general, that a consignee, *supercargo*, or other person, having a contract, which may afford him a profit or emolument, has an insurable interest in respect to the subject of such contract, so soon as he has done something, or begun to incur expenses and take steps, towards the execution of it.

Where the owners of a cargo agreed to pay the supercargo ten thousand dollars "out of the proceeds of any cargo the ship

<sup>1</sup> *Seamans v. Loring*, 1 Mas. C. C. 127; *Russell v. Union Ins. Co.* 1 Wash. C. C. 409; *Wolff v. Horncastle*, 1 Bos. & P. 316. Held in Kentucky that an agent may insure in his own name and recover the whole value, accounting to his principal for the surplus over his

own interest. *Ætna Ins. Co. v. Jackson*, 16 B. Monr. Ky. 242. An insurance in his own name where he has no interest is void. *Sawyer v. Mayhew*, 51 Me. 398.

<sup>2</sup> *Putnam v. Mercantile Mar. Ins. Co.* 5 Metc. Mass. 386.

might bring from Batavia, or to deliver him part of such cargo to that amount," on the ship's arrival at New York; it was not made a question, that the supercargo had an insurable interest to that amount.<sup>1</sup>

A quantity of moss shipped in Norway was consigned to the Cudbear Company, so called, of London, who refused the consignment, upon which Wolff and his partner, having no particular authority, otherwise than as being the general agents of the consignor, effected insurance, retaining the bills of lading in their own hands, and accepted bills on account of the consignment to the amount of £300. Their proceedings were subsequently approved of by the consignor. They were held to have an insurable interest to the amount of their acceptance. Buller, J., said: "I agree that a debt which has no reference to the article insured, and which cannot make a lien on it, will not give an insurable interest. But a debt which arises in consequence of the article insured, and which would have given a lien on it, does give an insurable interest."<sup>2</sup>

Where goods were shipped by Meybohm, at St. Petersburg, to Amyand, of London, to whom a general balance was due from Meybohm; though the bill of lading was indorsed by Meybohm to Tamesz, another Russian, Lord Mansfield and the other judges held, that Amyand had an insurable interest in the goods. "Various persons may insure various interests on the same bottom; here Mr. Amyand had an interest of his own, distinct from the interest of Meybohm; he had a lien upon these very goods, as a factor to whom a balance was due."<sup>3</sup>

In the case of ships captured and carried into Spain, where a compromise was made with the captors by giving up a part of the cargoes, and expenses were incurred on account of the property by Cowen, who consigned a part of it to Robertson, in England, on whom he drew bills for his expenses and disbursements, which Robertson accepted; it was held, that Robertson acquired an insurable interest by accepting the bills. And

<sup>1</sup> Robinson v. New York Ins. Co. 2 316. See also Conway v. Gray, 10 East, Caines, N. Y. 357; New York Ins. Co. 536; Russell v. Union Ins. Co. 1 Wash. v. Robinson, 1 Johns. N. Y. 616. See C. C. 409.  
also Flindt v. Le Mesurier, Park, Ins. 3 Godin v. London Ass. Co. 1 Burr. 8th ed. 563. 489; 1 W. Blackst. 103.

<sup>2</sup> Wolff v. Horncastle, 1 Bos. & P.

the circumstance<sup>e</sup> that the original owners had, in the mean time, abandoned the property to their insurers, was held not to affect Robertson's interest.<sup>1</sup>

Lord Ellenborough, however, seemed to think, that an agreement for a commission on such freight as the assured might procure for a vessel owned by another person, did not give an insurable interest. Knox, of Dublin, had an agreement with a house at Jamaica for loading such vessel as he should send to that island, and he agreed for a vessel to go out to Jamaica for a cargo, on the freight of which the owners were to allow him a commission. The vessel was detained at Jamaica so long, under an admiralty process, that she lost the season, and the Jamaica house sent on their goods by another, and Knox accordingly failed of receiving the stipulated commission. The judge said: "It strikes me, that this was a mere expectation. The assured had an interest in the ship only in the expectation of a cargo. This case carries us into the land of dreams, and, if supported, would introduce the practice of insuring two thousand pounds prize in a lottery, without purchasing a ticket."<sup>2</sup>

But it is not easy to distinguish the interest of Knox in this case from what has been allowed, under policies on lives and on profits, to constitute an insurable interest. A case occurred in Massachusetts, upon a policy on the commissions that the assured expected to receive as consignee of a vessel, and no objection was made on the ground of the insufficiency of the interest.<sup>3</sup>

A case has occurred in New York respecting a fire policy effected by the consignees, into whose hands goods came for sale, without any instruction as to insurance, and without any ratification of the policy on the part of the principals, until after they had a knowledge of the loss. The policy was effected by commission-merchants in New York, "on goods, as well the property of the assured, as held by them in trust or on commission." The assured had made advances to only a part of the

<sup>1</sup> Robertson v. Hamilton, 14 East, 522.      jecton to the claim of the assured in this case, that the loss was not occasioned by the perils insured against.

<sup>2</sup> Knox v. Wood, 1 Campb. 541, reported differently by Park, Ins. 405.      <sup>3</sup> Law v. Goddard, 12 Mass. 112. It seems to have been a sufficient ob-

amount insured; the question being, whether they had, as commission-merchants, an insurable interest in the goods to their full value, Jones, C. J., and his associate justices of the Superior Court of the city of New York, held that the consignees had an insurable interest in the goods on account of their own interest, and as trustees, to their full value, which was covered by a policy in this form, they being liable to account to their principals for the excess of the insurance over the amount of their own claims.<sup>1</sup>

This decision refers to the authority of a consignee of goods with power to sell, who is in possession of the goods. On the authority of a consignee who merely has notice of the consignment, the Chief Justice says: "If he should, upon receipt of the bills of lading, effect insurance *bonâ fide*, and for just cause, upon the goods consigned to him for the voyage of importation, I am not prepared to say that the contract would be void, or that the charge of the premium could be rejected by the consignor."

In a case adjudicated upon in the English Court of Common Pleas, Mr. C. J. Gibbs expressed his opinion, that a consignee has an insurable interest in goods consigned for sale, to the full value of the goods.<sup>2</sup>

It was held in the much-litigated case of *Lucena v. Craufurd*,<sup>3</sup> that commissioners appointed by the government to take possession and dispose of Dutch prizes, captured in anticipation of a war, had an insurable interest, as trustees of the captured property, to its whole value.

312. The master of the vessel, as master, is merely a carrier, and in his capacity of master merely has no general insurable interest in the ship or cargo<sup>4</sup> or freight. He has no lien on ship or freight for his wages; but where he has a lien on freight and cargo for advances,<sup>5</sup> he will have an insurable interest to the extent of such lien.

<sup>1</sup> *De Forest v. The Fulton Fire & Fire & Mar. Ins. Co.* 1 Hall, N. Y. 84. And 84.

see *Etna Ins. Co. v. Jackson*, 16 B. Monr. Ky. 242.

<sup>2</sup> *Carruthers v. Shedden*, 6 Taunt. 14; S. C. 1 Marsh. 416.

<sup>3</sup> 5 Bos. & P. 323, opinion of Lord Eldon. See also *De Forest v. Fulton*

<sup>4</sup> *Barker v. Marine Ins. Co.* 2 Mas. C. C. 369.

<sup>5</sup> *Ingersoll v. Van Bokkelen*, 7 Cow. N. Y. 670; *Lane v. Penniman*, 4 Mass. 92; *Milward v. Hallett*, 2 Caines, N. Y. 71; *White v. Baring*, 4 Esp. 22.



313. *Where goods are shipped in the master's name as a trustee, he has an insurable interest like any other trustee.*

Sugars belonging to Medina were shipped at Porto Rico, for Baltimore, in the name of Fitch, the master of the vessel, and consigned to him, and all the documents were made out accordingly, the object being to cover the property, Medina being a Spaniard, and Spain being then, 1822, at war with its revolted colonies. It was held, that Fitch had an insurable interest in the property to its whole value.<sup>1</sup>

*So a master or owner of a ship, or the proprietor of any vehicle used for transportation of goods, has an insurable interest in the goods to their full value, against those risks which he assumes as carrier, as, for instance, the risk of theft and that of negligence and misconduct of his servants and agents.*<sup>2</sup>

*Such carriers have also an insurable interest in the subject to be transported, so far as the earning of the freight or pay for transportation depends on the safety and delivery of the article, have an insurable interest in it to the amount of the freight or stipulated pay, in respect to all the perils and casualties on which the earning of the freight or payment for carriage depends, and that though they hire others to do the carrying.*<sup>3</sup>

314. *Mechanics and others who have, by commercial or statute law, a lien upon a foreign vessel or one of another state, or buildings, for repairs, have an insurable interest to the same amount.*<sup>4</sup>

#### SECTION VIII. INTEREST IN PROFITS.

315. *As a person, who is not owner of property, such as an agent or consignee, may insure his commissions, there seems to*

<sup>1</sup> Buck v. Chesapeake Ins. Co. 1 Pet. 151.

<sup>2</sup> De Forest v. Fulton Ins. Co. 1 Hall, N. Y. 84. In London, &c. R. Co. v. Glyn, 1 Ell. & E. 652, it was held that the carrier might insure and recover the whole value of the goods, holding the surplus over his charges as trustee for the owner, although the carrier

in this case was not legally liable to the owner for the whole value.

<sup>3</sup> Chase v. Washington Mut. Ins. Co. of Cincinnati, 12 Barb. N. Y. 595; Savage v. Corn Exch. Ins. Co. 4 Bosw. N. Y. 1.

<sup>4</sup> The Calisto, Dav. Dist. Ct. 29; Stout v. City Ins. Co. 12 Iowa, 371; Protection Ins. Co. v. Hall, 15 B. Monr. Ky. 411.

be as good reason why the owner should have the right of insuring the profits he expects to derive by its transportation, or any legal use he may propose to make of it. *Profits are frequently insured; nor does this species of insurance partake at all of the nature of gambling.* Lawrence, J., giving the opinion of the court, said: "As insurance is a contract of indemnity, it cannot be said to be extended beyond what the design of such species of contract will embrace, if it be applied to protect men from those losses and disadvantages which, but for the perils insured against, the assured would not suffer; and in every maritime adventure, the adventurer is liable to be deprived, not only of the things immediately subjected to the perils insured against, but also of the advantages to be derived from the arrival of those things at their destined port. It is surely not an improper encouragement of trade to provide that merchants, in case of adverse fortune, should not only not lose the principal adventure, but that the principal should not in consequence of such bad fortune be totally unproductive; and that men of small fortunes should be encouraged to engage in commerce by their having the means of preserving their capitals entire." <sup>1</sup>

316. *A party, having agreed to purchase an article on a certain contingency, has an insurable interest in his profits upon it.*

A party having agreed for half of a cargo, on its arrival in B., effected insurance on "profits on merchandise in schooner S. from M. to B." The cargo was prevented, by the perils insured against, from arriving at B. It was held in Massachusetts that the assured had a good insurable interest in the profits. Mr. Justice Putnam instanced insurance on commissions, to show that direct ownership is not necessary to insurable interest; and, giving the opinion of the court, said, "We know no good reason why the owner of goods at sea may not sell the profits, as well as the goods themselves." <sup>2</sup>

317. *It has been held, in many of the English cases, that, in order to create an insurable interest in profits, it must appear that there would, probably at least, have been a profit, had the property arrived at the place to which it was insured.*<sup>3</sup>

<sup>1</sup> Barelay v. Cousins, 2 East, 544.

Term, 483, n.; 3 Bos. & P. 85, n.; 3

<sup>2</sup> French v. Hope Ins. Co. 16 Pick. Mass. 397.

Doug. 16; Henrickson v. Margitson, 2 East, 549; Hodgson v. Glover, 6 East,

<sup>3</sup> Grant v. Parkinson, Park, 402; 6

316; Eyre v. Glover, 16 East, 218.

318. *In the United States, it is not necessary to show that there would actually have been a profit in order to constitute an insurable interest in profits.*

In New York, under a policy on profits, where three eighths of the goods were lost, the court held it to be a loss of that proportion of the profits, under the policy, without inquiring whether there would have been any profits had the goods arrived.<sup>1</sup>

Mr. Justice Johnson, giving the opinion of the court on the question, whether there was an insurable interest to which a valuation of profits could attach, said: "It is difficult to conceive, if profit be a mere excrescence of the principal, as some judges have said, why the loss of the cargo should not carry with it the loss of the profits. The rule has convenience to recommend it, of which this case presents a striking illustration. Here was a voyage of many thousand miles to be performed, the final profits of which must have been determined by the statement of the accounts passing through several changes, some of which might have resulted in loss, some in gain, and in each case the good or ill fortune of the adventure turning on the gain or loss of a day in the voyage. What human calculation or human imagination could have furnished testimony on a fact so speculative and fortuitous!"<sup>2</sup>

319. There is, as is remarked by Mr. Justice Kent, a great similarity in freight, profits, and commissions, the first being profits to arise out of the employment of the ship, the other two on the goods. He proceeds: "These insurances on freight, profits, commissions, &c., are said to be founded on the course and interests of trade, and are greatly conducive to its prosperity. *The doctrine, however, that runs through all the cases is, that the assured must have an interest in the subject-matter, from which the profits are to be derived*, in order to prevent the policy from being considered a wager. Policies on profits or freight, if the assured be owner of the subject from which the same are to accrue, are not wagers, but policies on a real and substantial interest."<sup>3</sup>

<sup>1</sup> Loomis v. Shaw, 2 Johns. Cas. N. Y. 36; and see Fosdick v. Norwich Mar. Ins. Co. 3 Day, Conn. 108; Mumford v. Hallett, 1 Johns. N. Y. 433.

222, Thompson, J., and Baldwin, J., dissenting. And see Alsop v. Commonwealth Ins. Co. 1 Sumn. C. C. 451.

<sup>3</sup> Abbott v. Sebor, 3 Johns. Cas. N.

<sup>2</sup> Patapsco Ins. Co. v. Coulter, 3 Pet. Y. 39.

## SECTION IX. INTEREST OF CAPTORS AND PRIZE AGENTS.

320. *Interest in prizes can be derived only from the government.*<sup>1</sup>

321. *Captors have an insurable interest in the captured property where they are by law entitled to a share of the proceeds of its sale in case of its being condemned as prize.*<sup>2</sup>

On its being objected that the captured property might be restored to the owners, or other disposition made of it, Lord Ellenborough said, that the right of stopping in transitu did not defeat the insurable interest of a consignee. "The indefeasibility of the property is not therefore the criterion of an insurable interest. What is the case of an executor? Probate is necessary to complete his title, yet before probate he has a title sufficient to enable him to insure." He accordingly was of opinion, that the captors had an insurable interest, and this was the judgment of the court.<sup>3</sup>

322. *The captors have an insurable interest on account of their responsibility for the captured property, where such responsibility is incurred by the capture, as it generally is.*<sup>4</sup> And the extent and amount of the insurable interest, so far as it rests upon this basis, is commensurate with the responsibility.<sup>5</sup>

323. On the question, *whether a mere expectation of a share of a prize, not supported by any provision of law, gives the captors an insurable interest in the captured property*, Lord Mansfield remarked, in an early case,<sup>6</sup> that, as "wherever a capture had been made, the crown had always given a grant of it after condemnation," this expectation, so grounded, gave the captors a sufficient insurable interest in the prize. But this

<sup>1</sup> The Joseph, 1 Gall. C. C. 545; The Elsabe, 4 C. Rob. Adm. 408; Routh v. Thompson, 11 East, 428, and 13 id. 274; Nicol v. Goodall, 10 Ves. 157.

<sup>2</sup> Le Cras v. Hughes, Park, 406; 3 Doug. 81, called the Omoa case; Boehm v. Bell, 8 Term, 154; Lucena v. Craufurd, 5 Bos. & P. 269; Pothier, Ins. n. 33.

<sup>3</sup> Stirling v. Vaughan, 11 East, 619;

<sup>2</sup> Campb. 225. See also, as to interest of captors, The United States v. Peters, 3 Dall. 121; The Mary Ford, 3 Dall. 188.

<sup>4</sup> Per Lord Kenyon, C. J., Boehm v. Bell, 3 Term, 154.

<sup>5</sup> See also Craufurd v. Hunter, 8 Term, 13; Lucena v. Craufurd, 3 Bos. & P. 75; 5 Bos. & P. 269.

<sup>6</sup> The Omoa case, 3 Dougl. 81.



proposition has been doubted by Lord Eldon,<sup>1</sup> and Lord Ellenborough,<sup>2</sup> and C. J. Tindal.<sup>3</sup> They are inclined to the opinion, though an expectation founded on property, or a right by law or by contract, gives an insurable interest, yet a mere probability, or merely reasonable expectation not so founded, does not give such a right.

*In such cases, though the party having the expectation has not an insurable interest in the subject-matter to which it relates, which would support an insurance upon it generally, he may have a sufficient interest in the contingency upon which his expectation depends, to be the foundation of a valid contract of guaranty or indemnity in relation to it, if his interest is described so as to be well understood by the other contracting party, and if there is no legal objection to the contract. Such a contract would have the character of an insurance. It does not seem to be a merely gambling one.*

324. *So commissioners, appointed by sufficient authority to take charge of prizes or other property, may, by the mere appointment, be authorized, as trustees, to insure it to its full value, in their own names.*<sup>4</sup>

#### SECTION X. INTEREST OF THE CHARTERER OF A SHIP.

325. *So far as a charterer of a ship is liable to damage by its loss, he has an insurable interest.*

The owner of one half of a schooner hired the other half, with an agreement, that, in case of its being lost within the term of the charter-party, the charterer, O., should pay M., the other part-owner, the value of his moiety. He then insured the schooner to its full value on his own account. Parsons, C. J.: "By virtue of this contract, O. had a special property in M.'s moiety, which was at his risk, and he might indemnify himself against loss by causing himself to be insured."<sup>5</sup> This was precisely the interest

<sup>1</sup> *Lucena v. Craufurd*, 5 Bos. & P. 269.

<sup>2</sup> *Routh v. Thompson*, 11 East, 432; but see *S. C.* 13 East, 274.

<sup>3</sup> *Devaux v. Steele*, 6 Bingh. N. C. 370.

<sup>4</sup> *Lucena v. Craufurd*, 3 Bos. & P. 75; 5 Bos. & P. 269; *Craufurd v. Hun-*

*ter*, 8 Term, 13; and see 3 Bos. & P. 13, n. . These celebrated cases arose on the seizure of the Dutch ships and cargoes in 1795 under an act of Parliament, preparatory to a declaration of war against Holland.

<sup>5</sup> *Oliver v. Greene*, 3 Mass. 133.

of an insurer as to M.'s moiety, on which O., having himself insured it, might effect reinsurance.

According to Lord Ellenborough's ruling, the other part-owner might still have insured his half of the schooner on his own account. H., the owner of a ship, had chartered her to W., who covenanted, that, if the ship should be lost, he would pay H. £3600. H. insured the ship on his own account, and it was lost. It was objected that, as W. was to pay for the ship in case of loss, H. had no insurable interest. Lord Ellenborough: "He was not bound to trust exclusively to the credit of W., but might likewise protect himself by insurance."<sup>1</sup> If the agreement with W. extended to the loss of the ship by the perils insured against in the policy, this was plainly, in effect, a double insurance; but under the form of policy used in England, this would raise no objection to the claim of the assured.

In the United States the terms of the common form of policy exclude double insurance, and the owner would, it seems, have an interest for his policy against the same perils that are assumed by the charterer only to the amount of the excess of his insurable interest, if any, over the amount for which the charterer is liable in case of loss. But in respect of other perils, if any, he still has an insurable interest to the full value of the ship.

326. *An agreement by the charterer to insure the ship, has been held to give him an insurable interest, to the same effect as an agreement to pay for her if lost.* The court said: "The assured must have a bonâ fide interest, but that interest may exist without a legal title to the property."<sup>2</sup>

#### SECTION XI. INTEREST IN FREIGHT.

327. "Freight," in the common acceptation of the term, is either the amount paid by the hirer of the ship to the owner for the use of it, or the amount paid to the ship-owner for the transportation of goods.<sup>3</sup> The term is also used to signify the cargo. *In insurance, the term "freight" signifies the earnings or profit*

<sup>1</sup> Hobbs v. Hannam, 3 Campb. 93. in Riley v. Hartford Ins. Co. 2 Conn.

<sup>2</sup> Bartlett v. Walter, 13 Mass. 267. 373.

<sup>3</sup> Falconer, Mar. Dict.; Hosmer, J.,

*derived by the ship-owner or the hirer of the ship from the use of it himself, or by letting it to others to be used, or by carrying goods for others.*

328. In regard to the commencement of *this interest*, it is a general rule that it *commences* not only by the vessel's sailing with the cargo on board, but also *when the owner, or hirer, having goods ready to ship, or a contract with another person for freight, has commenced the voyage or incurred expenses and taken steps towards earning the freight.*<sup>1</sup>

329. *The ship must be ready, and something must have been done, or expenses must have been incurred, towards earning freight; otherwise the interest has not accrued, as where the ship was lost while careening.*<sup>2</sup>

330. *As long as the destination of the ship on the voyage for which the freight is insured is contingent, the insurable interest in freight for that voyage does not accrue.*

Thus, in case of a policy on freight from Gibraltar to Bourdeaux, and thence to Philadelphia, the ship sailed from Gibraltar for Bourdeaux with twenty thousand dollars in specie on board, the master being ordered to purchase a cargo of brandy, in case of prices being at a certain rate, otherwise to take a cargo on freight, if it could be procured, or to proceed to Russia for a load of iron and hemp. The ship was wrecked on the passage to Bourdeaux. It was held, that the interest in the freight from Bourdeaux to Philadelphia had not accrued at the time of the loss.<sup>3</sup> It may have been a mere seeking voyage, and the master might not have been able to obtain brandy within his specified limits, or other cargo on freight, on arriving at Bourdeaux.

331. *So long as no contract for freight is made, and no cargo is ready, and no freight is procurable, no interest in freight has accrued.*<sup>4</sup>

332. *A contract for freight gives an insurable interest, as soon as the ship is ready to take it.*

Insurance being effected on the freight of a ship chartered to go to Teneriffe, and there take a cargo for the West Indies, and

<sup>1</sup> See cases *infra*.

<sup>3</sup> *Adams v. Penn. Ins. Co.* 1 Rawle,

<sup>2</sup> *Tonge v. Watts*, 2 Strange, 1251; Penn. 107.

and see cases *infra*.

<sup>4</sup> *Adams v. Penn. Ins. Co.* 1 Rawle, Penn. 107.

lost on the voyage to Teneriffe, before the cargo was taken on board under the charter-party, it was objected, that the insurable interest had not commenced at the time of the loss. It was however, held that it had commenced, and Lord Kenyon said: "It now seems admitted, that if the contract had its inception, if any thing were done under it by the assured, his right to freight commenced." <sup>1</sup>

An open policy was made on the freight of the ship *Marquis of Lansdowne*, at and from *Dominica* to *London*, the owner of which had a charter-party for a full freight outward and homeward, or for dead freight if a cargo should not be supplied; and while the ship lay at *Dominica*, ready to take on board the cargo, it was captured. Lord Ellenborough said: "The existence of the charter-party, giving an entirety to the contract of freight, was decisive, the voyage having once commenced." <sup>2</sup>

In the case of insurance on freight and passage-money, from *India* to *Europe*, a contract for the freight of goods and the passages of forty invalids had been made, and the ship had been altered for the accommodation of the passengers, and a greater part of the goods had been taken on board, when the ship was lost; it was held, that the owner had an interest in the whole freight and passage-money at the time of the loss. <sup>3</sup>

In case of the insurance on the freight of the ship *Hope*, at and from *Madras* to *London*, the *Hope* arrived in *Madras Roads* on the 30th of *November*, 1827, from which time to the 5th of *December* the crew were employed in discharging the outward cargo, and on the next day the ship was lost by the perils of the seas. No part of the homeward cargo had been shipped, but the owners had some goods ready to ship, and contracts for shipments by others; and it was adjudged that the interest in freight had commenced to the amount so ready and contracted by valid contracts. Lord Tenterden remarked, that, "to recover on a policy on freight, the assured must prove, that, but for the intervention of the perils insured against, some freight would have been earned, either by showing that some goods were put on board, or that there was some contract for doing so." <sup>4</sup>

<sup>1</sup> *Thompson v. Taylor*, 6 Term, 478.

See also *Mackenzie v. Shedden*, 2 Campb. 431.

<sup>2</sup> *Horncastle v. Stuart*, 7 East, 400.

<sup>3</sup> *Truscott v. Christie*, 2 Brod. & B. 320; 5 Moore, 33.

<sup>4</sup> *Flint v. Flemyng*, 1 Barnew & Ad. 45; 1 Lloyd & W. 257. See also *Wil-*



No particular form of contract for freight is requisite. It may be under seal, or merely in writing, or verbal. It is enough that it is a valid contract.<sup>1</sup>

333. *The owner having a specific cargo ready to put on board, and his preparations made, and his ship ready to proceed on the voyage, his insurable interest in freight has accrued, so that a policy upon it will attach.*

Where the owner of a ship, of which the freight was insured at and from the Coromandel Coast, had purchased the cargo, which was about seven miles from the port, and the ship was lost in coming out of the dock in a state of repair ready for taking the cargo, the interest in the freight was held to have commenced.<sup>2</sup>

Insurance being made on the freight of the ship *Etheta* from New York to Sisal, or some other port in the province of Yucatan, and back, "carried or not carried," the ship, after taking in a part of her cargo at Sisal, was driven on shore and lost. The rest of the cargo had been purchased and the export duty paid, and it was ready to be shipped, and would have been so, but for the unfavorable weather, when the ship was lost. The judges say: "As the freight was valued at the sum insured, 'carried or not carried,' the assured is entitled to recover as for a total loss, notwithstanding a full cargo was not on board."<sup>3</sup> It would, however, have been covered under a policy "on freight" simply.

It was held, where the freight was valued at £1500, and goods had been put on board, of which the freight would have been £500, the rest of the cargo being ready to be shipped, when the vessel was driven from her moorings and lost, that the insurable interest in the whole freight had accrued, and the assured was entitled to the whole sum insured.<sup>4</sup>

Under a policy on freight, at and from the island of Grenada to London, the ship discharged her outward and took in her homeward cargo, at different ports of the island, there being but one

*liamson v. Innes*, 8 Bingham 81, n.; and *Ingles v. Vaux*, 3 Campbell 437; and *Hall v. Brown*, 2 Dow, Par. Cas. 367. See also *Davidson v. Willasey*, 1 Maule & S. 313; *Livingston v. Columbian Ins. Co.* 3 Johns. N. Y. 49.

<sup>1</sup> *Patrick v. Eames*, 3 Campbell 441. See *Sellar v. M'Vicar*, 4 Bos. & P. 23.

<sup>2</sup> *Deveaux v. J'Anson*, 5 Bingham N. C. 519.

<sup>3</sup> *De Longuemere v. The Phoenix Ins. Co.* 10 Johns. N. Y. 127; *The same Plaintiff v. The New York Fire Ins. Co.* 10 id. 201.

<sup>4</sup> *Montgomery v. Eggington*, 3 Term, 362.

custom-house in the island. Mr. Justice Holroyd said, that the risk under the policy on the homeward freight had begun to take effect as soon as the ship had been twenty-four hours in safety at Grenada. In this case, however, the ship, at the time of the loss, was at that port of the island at which the loading was to be completed.<sup>1</sup>

But the interest in freight will commence only upon the freight of the cargo shipped or ready to be so, or the freight contracted for.

The freight of the ship *Cheswick*, at and from any ports in Hayti to Liverpool, being insured in a valued policy, the ship was lost by the perils of the seas, when she had discharged a part of her outward cargo, and taken in fifty-five bales of cotton of her homeward cargo, at Jacquemel, and was proceeding thence to Aux Cayes, to discharge the rest of her outward, and take in the remainder of her homeward cargo.

Upon these facts, Lord Ellenborough said: "In every action on such a policy, evidence is given, either that goods were put on board from the carriage of which freight would result, or that there was some contract under which the owner, if the voyage were not stopped by the perils insured against, would have been entitled to freight." The owner had no charter-party or other contract for freight, but goods were on board, sufficient to purchase the remainder of the homeward cargo, that were saved and afterwards bartered for goods, which would have completed the homeward cargo. It was decided, that the assured should recover only the freight of the fifty-five bales of cotton.<sup>2</sup>

The freight of the ship *Jane* had been insured at and from the Cape de Verd Islands to London. She had taken on board one hundred and fifty bags of orchella-weed, which was only a part of a cargo, at St. Nicholas, where she was wrecked. Lord Ellenborough instructed the jury, that an insurable interest in only the one hundred and fifty bags on board had accrued at the time of the loss.<sup>3</sup>

Mr. Justice Kent remarks, that an "inchoate right to freight,"

<sup>1</sup> *Warre v. Miller*, 7 Dowl. & R. 1; See also *Forbes v. Cowie*, 1 Campb.

<sup>4</sup> *Barnew. & C.* 538; 1 Carr. & P. 520.

<sup>2</sup> 237. <sup>3</sup> *Patrick v. Eames*, 3 Campb. 441.

<sup>2</sup> *Forbes v. Aspinwall*, 13 East, 323. See also *Moses v. Pratt*, 4 Campb. 297.

constitutes an insurable interest,<sup>1</sup> according to what was said by Mr. Justice Eyre: "If the goods be so situated as to create a well-grounded expectation of freight being realized, freight is insurable."<sup>2</sup>

If the expression, "the goods," has reference to a specific cargo, the proposition is in strict accordance to the jurisprudence on the subject. But the courts do not appear to have permitted the insured ship-owner to go into evidence that he would, in all probability or certainty, have obtained a cargo of his own or freight of the goods of others, at the proposed port of loading, had not his vessel been lost on its way thither; though, if the phraseology of Mr. Justice Eyre be accepted in its broadest sense, it will favor the admission of such evidence. The courts hesitate to enter upon such indefinite testimony; though there seems, in fact, to be as valid and sufficient an insurable interest in freight, where the vessel is going to a port merely to take a cargo, or part of one, on the owner's account, which he has funds on board, or unquestionable credit at the place, to procure, and which can, in fact, be there procured, as when he has a contract for freight thence. And he might, no doubt, so describe his interest in freight in the policy as to make the insurance valid.

But a general policy on freight has been held in Connecticut not to attach in such case; even where the owner has funds on board for the purchase of a cargo, or part of one, which the ship is going to a port for the purpose of procuring.

"The freight of goods laden or to be laden," being insured, a part of a cargo was taken at Gibraltar, and the ship was proceeding towards the Cape de Verd Islands, with funds to purchase salt there to make up the cargo, when she was lost. It was held, that the insurable interest had commenced only in respect of the goods shipped at Gibraltar.<sup>3</sup>

That the rule, as laid down by the judicial authorities, will operate very inequitably in some cases, is shown in one very early case decided in Boston by referees, whose authority upon this question would compare not disadvantageously with that of the judicial tribunals. The case was that of the ship *Eclipse*, of

<sup>1</sup> *Davy v. Hallett*, 3 Caines, N. Y. 16.

<sup>3</sup> *Riley v. Hartford Ins. Co.* 2 Conn. 368.

<sup>2</sup> *Curling v. Long*, 1 Bos. & P. 636.

Salem, which was piratically plundered of specie on the western coast of Sumatra, in 1836, having a part of her homeward cargo of pepper on board, and a sufficient supply of specie to purchase the remainder, there being at the time a sufficient supply of pepper on the coast. The freight for the voyage round was insured. If no insurable interest in the freight of the homeward cargo accrued until the shipment or purchase of the pepper, and only to the extent of such shipment or purchase, the policy did not afford the indemnity evidently contemplated by the parties; for it appeared by the policy, that the outward shipment was to consist of specie, the freight of which separately would have been but a trifle, and yet one entire full premium was given on the amount of freight for the whole voyage out and home, sufficient to indemnify the assured if the same amount of freight were considered to be at risk out and home. In consequence of the piracy, the ship returned with only a part of a cargo, and the assured claimed indemnity for his loss of freight. There were other questions between the parties, and the objection to this claim was not very strongly urged by the underwriters. The referees were decidedly in favor of allowing the claim under these circumstances.<sup>1</sup>

The equity and propriety of this award are obvious in respect to a voyage conducted as East India voyages usually were at that time, when ships usually went out in ballast, with specie for the purchase of a homeward cargo; which was a more reliable security for a homeward freight than any charter-party could be. It may be said that good rules will sometimes work inequitably; but it is certainly desirable to adopt such as will be least liable to work so. I therefore venture to suggest a modification of the expression of the doctrine upon this subject; namely, that,

*Where the vessel has sailed for an intended port of loading, for the mere purpose of there taking a cargo for a subsequent passage, to procure which the owner has funds on board or reliable credit and it appears that such a cargo can undoubtedly be there procured, the interest in freight, for the entire voyage homeward, has accrued.*

I do not perceive that such a rule would be impracticably indefinite and uncertain in its application, and it is within a liberal

<sup>1</sup> Peabody v. Marine Ins. Co. of Salem, 1839, (MS.)



construction of the terms in which the doctrine on this question is laid down by Mr. Justice Eyre,<sup>1</sup> and cited by Mr. Justice Kent, and in close analogy to the jurisprudence next to be referred to.

334. *A charter-party being made for successive passages, at an entire freight, the interest in the whole freight commences on the first passage, though the ship may sail in ballast merely on that passage, provided it is let by the assured, or he has a cargo ready at the intermediate port.*

The owner of the ship *Olive Branch* let her by charter-party for a voyage from Bourdeaux to New York, Buenos Ayres, and back to Europe, for the entire sum of eighteen thousand dollars. The ship had arrived at New York in the prosecution of the voyage, where she was detained by an embargo, after her cargo had been discharged, and before the cargo for Buenos Ayres was put on board. Chief Justice Kent, giving the opinion of the court, said: "The risk had attached on the whole freight. The charter-party gave an entirety to the contract of freight."<sup>2</sup>

In a case upon a policy on freight "from New York to Wilmington, and thence to Barbadoes," the assured had bought a cargo, which was to be taken on board at Wilmington had not the vessel been lost on the way thither. Mr. Justice Washington held, that the interest in the whole freight commenced at the time of the vessel's sailing from New York.<sup>3</sup>

335. *A vessel being chartered from A. to B., the interest in the freight commences under the charter-party on the vessel's sailing for A., either in ballast or with a small quantity only of goods, for B.*

That is, if the prior passage is merely preliminary to the one for which the vessel is chartered, having no cargo deliverable at A. or any intermediate port, and the object in the passage to A. is merely to prosecute the voyage thence to B., the interest in the whole freight under the charter-party accrues on the commencement of the first passage.

A ship chartered at New York to take a cargo of timber, then ready to be shipped, from St. John's River, in Florida, to Charles-

<sup>1</sup> *Curling v. Long*, 1 Bos. & P. 636.

<sup>2</sup> *Hart v. Delaware Ins. Co.* 2 Wash.

<sup>3</sup> *Livingston v. Columbian Ins. Co.* C. C. 346.

<sup>3</sup> *Johns*. N. Y. 49.

town, was lost on her passage to St. John's. The interest in the whole freight was held to have accrued.<sup>1</sup>

Under a policy by the owner upon "freight on board," at and from Cadiz to a port in Sicily, the vessel, being let on charter for an entire sum from Palermo to the United States, was lost in the Bay of Cadiz on her passage to Sicily, having on board only a small quantity of goods, and those shipped for the United States. The interest in the whole voyage under the charter-party was held, in Massachusetts, to have commenced, to the amount of the whole stipulated charter-money.<sup>2</sup>

336. *The rules above laid down relative to the commencement of the interest of the owner in the freight, are applicable to a charterer, who has hired the whole or any part of the ship, as far as the earning of freight is thus put at his risk ; he being thus far in the place of owner.*<sup>3</sup>

The charter-party often leaves some perils at the owner's risk, and puts others at the risk of the charterer, in which case each will have an insurable interest in freight against the perils that are at his risk. If, for instance, the charterer assumes the peril of capture, and other perils of the seas remain with the owner, each may insure freight to its full amount against the perils at his risk.<sup>4</sup>

As in case of the charterer's taking the risk of the Russian government's not permitting the cargo to be discharged.<sup>5</sup>

337. *If the charterer by a sub-charter, or by carrying goods, will, the perils of the voyage excepted, realize earnings exceeding the amount of the charter-money which he has agreed to pay to the owner for the use of the ship, he has an insurable interest in the excess against all perils.*

And it will make no difference whether the charterer transports his own cargo, or takes goods on freight, or makes up the cargo in both of those ways. If the earnings to be realized exceed the charter-money to be paid, he undoubtedly has an insurable interest to the amount of the excess. But if there is no such excess,

<sup>1</sup> Adams v. Warren Ins. Co. 22 Pick. Mass. 163.

<sup>2</sup> Robinson v. The Manufacturers' Ins. Co. 1 Mete. Mass. 143.

<sup>3</sup> Mestaer v. Gillespie, 11 Ves. jun. 621.

<sup>4</sup> See Sanson v. Ball, 4 Dall. 459; Mackenzie v. Shedden, 2 Campb. 431; Clark v. Ocean Ins. Co. 16 Pick. Mass. 289.

<sup>5</sup> Puller v. Staniforth, 11 East, 232; Puller v. Halliday, 12 East, 494.

then the charterer has no insurable interest against the same perils that are at the risk of the owner by the charter-party.<sup>1</sup>

338. *An advance made on the charter-party by the charterer, to defray the expenses of the ship on the voyage, or for any other purpose, under a stipulation that the same is to be at his risk, and the owner not chargeable therewith in any event, gives the charterer an insurable interest in freight, against all risks, to the amount so advanced. In order to recover the loss, the charterer must prove that the advance was actually made; the proof of the agreement to make it will not be sufficient under his policy on freight.*<sup>2</sup>

But if the owner is absolutely chargeable with the advance, and liable for the same as a debt, independent of the issue of the voyage, then no insurable interest accrues to the charterer therefrom, any more than from any other demand he may have against the owner;<sup>3</sup> except that if the charterer, by the construction of the charter-party, is entitled to a lien on the stipulated charter-money, and has a right to retain the same, to the amount advanced, he has an insurable interest on account of such lien to such amount, just as a lender on mortgage or bottomry, or any other party having a lien, has such an interest.

339. *If a person sells a ship, reserving the use of it for a certain voyage or time, he stands in the place of a charterer, and has a similar insurable interest.*<sup>4</sup>

340. *The mere advancing of the freight of goods will not give the party making the advance any insurable interest in the freight so advanced, in case of his having a right to recover it back, if the goods on which the freight is advanced shall not be delivered according to the bills of lading.*<sup>5</sup>

<sup>1</sup> *Mellen v. National Ins. Co.* 1 Hall, N. Y. 452. It was decided in this case that the charterer could not insure his interest under the description of "freight;" but this position is at least questionable. See *infra*, No. 480.

<sup>2</sup> *Mansfield v. Maitland*, 4 Barnew. & Ald. 582; *Wilson v. Royal Exch. Ass. Co.* 2 Campb. 623; *Robbins v. New York Ins. Co.* 1 Hall, N. Y. 325.

<sup>3</sup> *De Silvale v. Kendall*, 3 Maule & S.

37; *Mansfield v. Maitland*, 4 Barnew. & Ald. 585; *Winter v. Haldimand*, 2 Barnew. & Ald. 649; *Saunders v. Drew*, 3 id. 45; *Lee v. Barreada*, 16 Md. 190. *Contra*, *Kinsman v. New York, Ins. Co.* 5 Bosw. N. Y. 460. This was for freight advanced to the charterers.

<sup>4</sup> See *Riley v. Delafield*, 7 Johns. N. Y. 522.

<sup>5</sup> See *Wilson v. Martin*, 11 Exch. 684; 34 Eng. L. & Eq. 496; *Kathman v. Gen.*

And it has been held, that where the freight is advanced without any other conditions and stipulations than those contained in an ordinary bill of lading, in case of the delivery of the goods at the port of destination being prevented, so that no freight could have been recovered of the shipper if none had been advanced, he may recover back the amount advanced.<sup>1</sup>

So it has been ruled that money lent to the master, payable out of freight, gives no insurable interest in freight;<sup>2</sup> that is, supposing the master does not undertake to assign or pledge the freight, or, if he so undertakes, without authority from the nature of the loan contracted, or otherwise, to pledge it.

341. *The freight of a part of a voyage may be insured.*

A ship sailed from St. Ubes for Gottenburg, but was to put into Portsmouth for convoy. The freight was insured from St. Ubes to Portsmouth. Lord Ellenborough said: "There is no doubt that a party may insure his ship or goods for a part of a voyage; I cannot conceive why he may not insure freight in the same manner. There is no case which intimates the contrary, except *Murdock v. Potts*,<sup>3</sup> which is inconsistent with all the other cases."<sup>4</sup>

342. *If the owner of the ship advances money for wages or charges, he has an insurable interest in consequence;<sup>5</sup> and the same holds true of the charterer.<sup>6</sup>*

#### SECTION XII. INTEREST IN FISHING VOYAGES.

343. In whaling voyages two subjects are distinctly specified, which are not so in commercial marine insurance; namely, "outfits," consisting of the apparatus for taking whales, and

M. Ins. Co. 12 La. Ann. 35; *Minturn v. Warren Ins. Co.* 2 All Mass. 86.

<sup>1</sup> *Griggs v. Austin*, 3 Pick. Mass. 20.

<sup>2</sup> *Wilson v. Royal Exc. Ass. Co.* 2 Campb. 623.

<sup>3</sup> *Park*, 451.

<sup>4</sup> *Taylor v. Wilson*, 15 East, 324. See also *Gordon v. American Ins. Co. of New York*, 4 Den. N. Y. 360. So

freight may be insured by a time policy. *Michael v. Gillespy*, 2 C. B. N. S. 627.

<sup>5</sup> *Salvador v. Hopkins*, 3 Burr. 1707; *Bell v. Bell*, 2 Campb. 479. Though *Siffken v. Allnutt*, 1 Maule & S. 39, seems to be contrary; but the facts do not appear distinctly.

<sup>6</sup> *Sanson v. Ball*, 4 Dall. 459.



trying out the oil, casks, stores of provision and clothing for the men, &c., and "takings," or "catchings." Part of the former and all of the latter of these interests constitute cargo.

One of these two interests, namely, the outfits, will evidently be diminishing during the whole voyage; and a part of it will, during a long voyage, as such usually are, be consumed and replaced from time to time.

The "catchings" accrue and accumulate during the voyage, according to the success of the adventure; and the interest in these is divided between the owners on one part, and the officers and crew on the other, each man on board being entitled to a certain share, which, however, is pledged to the owners for whatever charges may stand against him for articles supplied to him, with which, by the rules and customs of this fishery, he is chargeable.

Again, the men usually give orders for the supply of their families at home, during their absence on the voyage, for which they not unfrequently pledge their shares to the parties who furnish such supplies, whether owners of the vessel or others.

The various insurable interests in the "catchings" are, therefore, somewhat complicated, but still not so as to present any great embarrassment in ascertaining the proportions of interest, or adjusting losses.

It is usual with the owners to make insurance upon the ship and outfits, and at the same time to provide that a certain proportion, commonly one fourth, of the catchings at any time at risk, shall "replace" the outfits consumed.<sup>1</sup>

Other forms of policy have a provision that, so soon as the catchings shall amount to a certain specified sum, according to the rate of valuation of the oil and whalebone, agreed on in the policy, a certain amount of the insurance shall be applied to this interest exclusively.<sup>2</sup>

344. The interest of the officers and men is insured under the description of "share" in whaling voyages, and "lay" in cod-fishing and mackerel-fishing.

345. In cod-fishing voyages, as they are conducted in the United States, the outfits consist of the great and the small "general." The "great general" is supplied wholly by the owners,

<sup>1</sup> New Bedford form.

<sup>2</sup> New York form.

and includes the salt for curing the fish, the bait, premium of insurance, and some other small articles and expenses. The "small general" is supplied by each man for himself, and consists mostly of the provisions and fuel. The insurable interest of the owners accordingly consists of their interest in the vessel, the "great general," and their proportion of the fare, or "stock," which is customarily one quarter, or, including the expense of curing the fish, three eighths.<sup>1</sup> The interest of the men in the proceeds of these voyages is rarely insured.

Voyages in mackerel-fishing are conducted in a similar way, and the interests of the several parties are not unlike those in a cod-fishing voyage.

#### SECTION XIII. INTEREST IN FIRE INSURANCE.

346. There is no distinction between marine and fire policies, as to the kind and degree of interest necessary to constitute the basis of a policy. Fire is, as we have seen, one of the risks ordinarily insured against in marine policies.

347. *Notwithstanding a defect in the conveyance* of a building in fee, *the grantee has an insurable interest* to its full value, under a general description of the subject, where the defect in the conveyance is amendable by proceedings in equity.<sup>2</sup>

348. *The owner still retains his insurable interest* in a building to its full value, *notwithstanding an agreement to sell* it for a price which the other party is not the less liable to pay though it be consumed by fire, if it is part of the agreement that the building

<sup>1</sup> The owners usually supply the men with more or less of the "small general," and, as they depend wholly upon the proceeds of the voyage for payment, it is understood, by some persons conversant in this business, that they have an insurable interest to the amount of the "small general" supplied by them, though the price is in fact legally and absolutely due from the men. Their insurable interest in the shares of the men in such case, therefore, if they have such, is that of mortgagees. An-

ciently, vessels employed in the mackerel, herring, and other fisheries, made a sort of mutual insurance, by agreeing to share their fares. Laws of Oleron, a. 28; 1 Pet. Adm. xlv. And an agreement of the same description between two whaling ships, called a "mateship," has been held to be valid in Massachusetts. *Baxter v. Rodman*, 3 Pick. Mass. 435.

<sup>2</sup> *Swift v. Vermont Mut. Fire Ins. Co.* 18 Vt. 303.

is to be mortgaged to the vender, or retained by him, as security for the purchase-money.

It was so held in a case where the purchaser had, before the building was burnt down, failed to comply with his agreement to complete the purchase, and make payment and give security within a certain time.<sup>1</sup>

349. *If a tenant for life and the remainder-man join in effecting insurance, they will be proportionally interested, and the application of the proceeds of the policy in repairs will give to each a just proportion of the benefit of the insurance.*<sup>2</sup> But if the tenant for life insures a building without any agreement with the remainder-man respecting the insurance, the latter has no interest in the policy, and the assured may apply the proceeds in putting up a new building in place of the one burnt down, or not, as he may choose.<sup>3</sup>

350. *A husband having a right to tenancy by courtesy in the event of his surviving his wife, has an insurable interest in her real estate;*<sup>4</sup> and in real estate conveyed to the wife in Maryland under statute of 1842, c. 29, § 1.<sup>5</sup>

351. *A judgment-creditor who has, by virtue of his judgment, a lien on the real estate of his debtor, has an insurable interest in such estate, and, having effected a policy upon it, may recover for a loss that takes place after he has subsequently purchased the estate, at a sale of it, on his execution.*<sup>6</sup>

<sup>1</sup> Fire & Marine Ins. Co. of Wheeling v. Morrison, 11 Leigh, Va. 355. The court considered the assured accountable to the purchaser for the amount paid for the loss, on the latter afterwards completing the purchase.

<sup>2</sup> Brough v. Higgins, 2 Gratt. Va. 408.

<sup>3</sup> Haxall's Executors v. Shippen, 1 Leigh, Va. 437.

It is laid down that he may insure and recover for the full value of the building, but this can be only by the insurers being precluded from disputing the amount of a loss equal to the

full value of the building, for the value of his interest is certainly less than the value of the building. Permitting him to recover for the whole value of it, in an open policy, is, therefore, to permit the recovery of the full amount in an over-insurance.

<sup>4</sup> Franklin Ins. Co. v. Drake, 2 B. Monr. Ky. 51; Harris v. York Ins. Co. 50 Penn. St. 341.

<sup>5</sup> Mutual Ins. Co. v. Deale, 18 Md. 26.

<sup>6</sup> Mickles v. Rochester City Bank, 11 Paige, Ch. N. Y. 118.

## SECTION XIV. INTEREST IN LIVES.

352. *The insurance of the life of a freeman was prohibited in France,*<sup>1</sup> because it is said to be above price, and is not a subject of commerce, and it is wrong to allow it to be a matter of commercial speculation; and because such an insurance is a wager, and tends to instigate men to crimes.<sup>2</sup> And Boulay Paty contends strenuously against such insurance on these grounds, and in 1820<sup>3</sup> insists on the illegality of a license for it to a company by the king. It has, however, since then, come much into use in that country; and is prevalent in other parts of Europe. Insurance, whether upon lives or property, no less than banking, bills of exchange, &c., offers great facilities and temptations to imposition, frauds, and swindling and other crimes. This seems, however, rather to be a reason for legal provision for inspection, and regulation and restriction, than for absolute prohibition.

353. *One who is directly liable to a loss by the death of any person, has an insurable interest in the life of such person.*

A creditor has an insurable interest in the life of his debtor.<sup>4</sup> "The policy," says Lord Mansfield, "may be considered a collateral security for the debt,"<sup>5</sup> and therefore depends upon the same principle as a policy upon the interest of a mortgagee.

Lord Kenyon instructed the jury, in case of a debt due from N. to A., and an agreement between A. and M., on a settlement of accounts, that the debt should "remain to the account of M. only," that A. still had an insurable interest in the life of the debtor.<sup>6</sup> But it does not appear what interest A. could have.

354. *This interest, like any other, must be a legal one; a note given for money won at play, gives no insurable interest in the life of the maker, the debt being illegal, and the note void.*<sup>7</sup>

<sup>1</sup> Ordinance 1681, Ins. a. 10; Estrangin's Poth. Ins. No. 27, n.; Code de Com. a. 334.

in the lives of the partners; Morrell v. Trenton Ins. Co. 10 Cush. Mass. 282.

<sup>5</sup> Stackpole v. Simond, Park, 648; Marsh. 772.

<sup>2</sup> 1 Emerigon, 198, c. 8, s. 1.

<sup>6</sup> Anderson v. Edie, Marsh. 776; Park, 640.

<sup>3</sup> Cours de Droit Commercial, pp. 446-505, ed. Paris, 1823.

<sup>4</sup> Rawls v. American L. Ins. Co. 27 N. Y. 282. And the creditor of a firm

<sup>7</sup> Dwyer v. Edie, Marsh. 779; Park, 639.



An annuitant has an insurable interest in the life of the grantor of the annuity.<sup>1</sup>

A partner has an insurable interest in the life of his copartner.<sup>2</sup> A reasonable expectation of gain from the continuance of the life insured, or of pecuniary loss from his death, is sufficient interest.<sup>3</sup> A father has an insurable interest in the life of a minor child,<sup>4</sup> and a wife in the life of her husband, which continues after divorce.<sup>5</sup>

355. *The interest may be indirect.* An annuitant, whose annuity is for the life of another, has an insurable interest in such life.

356. *The interest may be contingent, and subject to be defeated.*

The holder of a voidable promissory note of an infant has an insurable interest in his life, for he may not avoid it.<sup>6</sup>

In regard to this, as well as other subjects of insurance, an interest contingent in itself, and that might be defeated, or might eventually not have been of any value to the assured, is still a good insurable interest. A young woman who "was, and had been for several years, supported and educated at the expense of her brother, who stood towards her in loco parentis, was held to have an insurable interest in his life;" and Parker, C. J., giving the opinion of the court, said: "A policy effected by a child upon the life of a father, who depended upon some fund, terminable by his death, to support the child, would never be questioned."<sup>7</sup> But there should be some pecuniary interest to support such a policy.<sup>8</sup> It is, however, not necessary that the interest should exist at the time of the death;<sup>9</sup> nor that it should correspond in amount to that specified in the policy; the latter being the measure of liability.<sup>10</sup> The assignee of a policy needs not to prove

<sup>1</sup> Glynn v. Locke, 3 Drury & Warr. Ch. Ir. 11.

<sup>2</sup> Valton v. National Ass. Soc. 22 Barb. N. Y. 9, 20 N. Y. 32.

<sup>3</sup> Miller v. Eagle Ins. Co. 2 E. D. Smith, N. Y. 268; Hoyt v. New York Ins. Co. 3 Bosw. N. Y. 440.

<sup>4</sup> Loomis v. Eagle Ins. Co. 6 Gray, Mass. 396; Mitchell v. Union Ins. Co. 45 Me. 104.

<sup>5</sup> McKee v. Phoenix Ins. Co. 28 Mo. 383.

<sup>6</sup> Dwyer v. Edie, ut supra. And if the creditors pay the premium they are

entitled to the policy as collateral, if the insurance is in the name of the minor. Rivers v. Gregg, 5 Rich. Eq. So. C. 274.

<sup>7</sup> Lord v. Dall, 12 Mass. 115.

<sup>8</sup> Holford v. Kymer, 10 Barnw. & C. 724; Ruse v. Mutual Ins. Co. 23 N. Y. 516.

<sup>9</sup> Dalby v. India Ins. Co. 15 C. B. 365; 28 Eng. L. & Eq. 312; Rawls v. American L. Ins. Co. 27 N. Y. 282.

<sup>10</sup> Bevin v. Connecticut Ins. Co. 23 Conn. 244; Hoyt v. New York Ins. Co. 3 Bosw. N. Y. 440.

an interest; that of the assignor is sufficient to support his claim.<sup>1</sup>

357. Very few questions, says Mr. Ellis,<sup>2</sup> have arisen on the subject of interest under life policies, because the offices are not in the habit of taking that objection, unless they are under the necessity of resisting payment upon some other fair and proper ground, as fraudulent misrepresentation and concealment; and, if they are driven to resist on such ground, they can, in order to make their case the stronger, sometimes also object to the want of interest, when the policy is open to that objection.

358. The English Court of Common Pleas intimate a doubt whether *one can insure his own life* for the benefit of another who merely advances the premium.<sup>3</sup> But such insurance is common, and seems not to be subject to objection in a *bonâ fide* transaction.

It is never questioned that one has an adequate insurable interest in his own life.<sup>4</sup>

#### SECTION XV. INTEREST IN DOUBLE INSURANCE.

359. DOUBLE INSURANCE, *or, which is the same*, OVER-INSURANCE, *is where two or more insurances are made in favor of the same assured, on the same interest in the same subject, against the same risks.*<sup>5</sup> The term "double insurance" is more applicable to duplicate insurance to the whole amount of the interest.

360. *In France over-insurance is not permitted*, and in case of policies identical as to the party, interest, and risks, exceeding the amount of the insurable interest, without fraudulent intent, the first underwriters only to the amount at risk are liable.<sup>6</sup> But if the insurances are all of the same date, Boulay Paty is of opinion that the underwriters would be liable pro rata, and the premiums

<sup>1</sup> Trenton Ins. Co. v. Johnson, 4 Ins. Co. 2 Hurlst. & N. Exch. 42, 40 Zab. N. J. 576. Eng. L. & Eq. 465.

<sup>2</sup> Ellis, Ins. 123; Von Lindenau v. Desborough, 3 Carr. & P. 353; S. C. 8 Barb. N. Y. 9, 20 N. Y. 32. <sup>4</sup> Valton v. National Ass. Soc. 22 Barnew. & C. 586. <sup>5</sup> Irving v. Richardson, 1 Macl. & R.

<sup>3</sup> Wainwright v. Bland, 1 Mees. & W. Exch. 32; Shilling v. Accidental Hou. L. Sc. 153; 2 Barnew. & Ad. 193. <sup>6</sup> Code de Commercial, a. 359.

for the excess returnable pro rata, with the usual deduction of one half per cent.<sup>1</sup> This rule, therefore, leaves no interest for double insurance, except in case of simultaneous policies.

361. *In England, the different underwriters in over-insurance, whether at the same or successive dates, are liable pro rata for loss, and if the assured compels full indemnity from some of the underwriters, they may come upon the others for pro rata reimbursement.*<sup>2</sup> *And in the United States the rule is the same where the policy contains no clause to control it.*<sup>3</sup> *There is, therefore, in both countries, an insurable interest for double insurance to any amount.*

362. *The operation of the above rule evidently is, to make the insurers in double insurance mutual guarantors for each other, the risk of which guaranty to each insurer will depend upon the solvency of collateral insurers. To remedy the inconveniences of the application of the above rule, the provision already mentioned was introduced into marine policies in the United States,*<sup>4</sup> *making only the prior insurers in favor of the same parties, on the same interest, against the same risks, up to the amount of the value of the subject, answerable, and exonerating the subsequent insurers to the amount of the excess;*<sup>5</sup> *on which excess the premium is to be returned, deducting the half per cent. where such deduction is stipulated for or customary.*

363. Under the clause making only the prior insurers, to the amount of the insurable value of the subject, liable, *if the over-insurance is made by simultaneous policies, or simultaneous subscriptions to the same policy, all the insurers are liable pro rata.*<sup>6</sup>

364. In the jurisprudence of France, the different policies, and

<sup>1</sup> Cours de Droit Com. tit. des Ass. s. 20, tom. 4, pp. 116, 117, 118, ed. 1823. So he infers from a. 1383 of the Code Civil, and a. 349 of the Code de Commercial.

<sup>2</sup> Newley v. Reed, 1 W. Blackst. 416; Rogers v. Davis, Beawes, Lex Merc. 242, cited Marsh. Ins. 2d London and Condy's Am. ed. 147, also Park, 423; and Davis v. Gildart, Beawes, Lex Merc. 242; S. C. Marsh. ut supra; Park, Ins. 424; Godin v. London Ass. Co. 1 Burr. 489.

<sup>3</sup> Craig v. Murgatroyd, 4 Yeates, Penn. 161; Thurston v. Koch, 4 Dall. 348, and App. xxvii.; Millaudon v. Western Mar. & Fire Ins. Co. 9 La. 27; Peoria Ins. Co. v. Lewis, 18 Ill. 553. See also, to the same effect, Casa Reg. Disc. 1, No. 91.

<sup>4</sup> Supra, No. 32.

<sup>5</sup> 5 Serg. & R. Penn. 475. See infra, c. 14, s. 3.

<sup>6</sup> Seamens v. Loring, 1 Mas. C. C. 128; Kent v. The Manufacturers' Ins. Co. 18 Pick. Mass. 19.

subscriptions to a policy, of the same date, are considered to be simultaneously made; <sup>1</sup> but in American jurisprudence, *under the clause relative to prior and subsequent policies, it may be proved that either policy was, in fact, made on a day different from its date, and that one of two policies was issued, or one of two subscriptions to a policy was made, at an earlier hour of the same day.*<sup>2</sup>

365. *If two or more policies, containing the clause in question, are made on the same day, and not distinguishable as to priority, the clause is not applicable, and if the amount of them all exceeds that of the insurable interest at its highest estimation in either of them, it is a double insurance of a part or the whole of the interest, and the different sets of underwriters are accordingly liable for pro rata contribution to any loss.*<sup>3</sup>

366. *To constitute double insurance, the insurances must be on the same subject.*

It does not appear that, if a subject insured by one policy is then insured again to an amount in the aggregate exceeding its value, it is the less a double insurance, because divers other subjects are insured in either or both of the policies, for the loss on this should be contributed for pro rata by the two or more sets of underwriters, as if all the policies were upon this subject only. If the policies are so made that the premium on the common subject cannot be distinguished in some of the policies, so as to be returnable under the provision relative to double insurance, it is the fault of the assured, and he must bear the inconvenience; for, having agreed to a stipulation in a policy against double insurance introduced for the benefit of both parties to that policy, it would be a violation of all principle that he should be permitted to defeat its operation in favor of the insurer, by the form of his contract with a third party.

Accordingly, I cannot but doubt a decision in New York. It was a case of insurance of one thousand dollars on fixtures and three thousand on stock in one policy, and then five thousand dol-

<sup>1</sup> Boulay Paty, Cours de Droit Com. tit. 10, s. 20, tom. 4, pp. 116, 117, ed. 1823, who cites Kuricke Diatr. No. 16; Casa Reg. Disc. 1, No. 65.

<sup>2</sup> Lee v. Mass. Fire & Mar. Ins. Co. 6 Mass. 208.

<sup>3</sup> Potter v. Marine Ins. Co. 2 Mas. C. C. 475; Wiggin v. Suffolk Ins. Co. 18 Pick. Mass. 145.



lars on fixtures and stock in another, without discriminating any proportion for each. It was adjudged that the assured was entitled to recover on the full amount insured in the former without apportionment, though the amount insured in the two exceeded the actual value, on the ground that the premium in the prior policy could not be apportioned between stock and fixtures.<sup>1</sup> The court does not mean that no estimate could be made of such an apportionment, for plainly nothing is easier, but that they are precluded from making it; a notion derived from some of the early English precedents.<sup>2</sup>

367. *Where different risks are insured against by the same party on the same interest not over its full amount in each of two or more policies, it is not an over-insurance, and the provision respecting prior and subsequent insurances is not applicable.*<sup>3</sup>

368. *If the aggregate amount insured by divers policies on a subject, does not exceed the value in one of them, as estimated under the common rule, or as agreed, it is not a double insurance in respect to such one.*

As where, one thousand dollars being insured by a prior policy in which the subject is valued at that amount, the same sum is insured in a subsequent policy in which the subject is valued at two thousand dollars.<sup>4</sup>

369. *Two insurances may be double, though the risks commence, or terminate, at different times.*

During the time while the two insurances concur and run parallel, the risks, being specified by the same description in both, are identical, and come within the phraseology, and the object, of the provision relative to prior and subsequent policies. The objection, if there be such, is the supposed impracticability, or the inconvenience, of apportioning the premium on the policy for the longer period. But notwithstanding the assertion of such impracticability,

<sup>1</sup> Howard Ins. Co. v. Scribner, 5 Hill, N. Y. 298.

<sup>2</sup> For a full discussion as to what makes a double insurance in such a case, and for later cases, see *infra*, No. 1263 a.

<sup>3</sup> Perkins v. N. E. Marine Ins. Co. 12 Mass. 214.

<sup>4</sup> Murray v. Insurance Co. of Penn.

2 Wash. C. C. 186. See also M'Kim v. Phoenix Ins. Co. 2 id. 89; Bousfield v. Barnes, 4 Campb. 228; Higginson v. Dall, 13 Mass. 96; Minturn v. Columbian Ins. Co. 10 Johns. N. Y. 75; Kane v. Commercial Ins. Co. 8 id. 229; Pleasants v. Maryland Ins. Co. 8 Cranch, 55.

bility in some cases, it does not appear that there is any insuperable difficulty in estimating its amount for a part of the period in any case whatsoever, and in most cases it can easily be done.

Upon a demand of return of premium for over-insurance on a subsequent policy made on a risk "at and from" Bayonne, the prior one being "from" the same port, the court in New York decided against the claim, on the ground that the underwriters had run the risk of the whole sum insured "at" Bayonne, before the risk on the prior policy attached.<sup>1</sup>

Whatever may be held as to return of premium, surely two policies, according to the specific terms of which, independently of the provision relative to prior and subsequent insurance, and the rule for apportioning a loss, the same party would be entitled to double satisfaction for the loss of the same interest, in the same subject, by the same perils, should belong to the class of double insurance.

A Louisiana case presents two insurances on the same cargo of cotton, to an amount in the aggregate exceeding its value, for different periods; namely, the first one in London for a voyage from New Orleans to Liverpool, the subsequent one in New Orleans on the same article, against fire, while it was stored there, having been brought back from the ship, which had run aground in going down the Mississippi. A total loss was paid by the London underwriters, who thereupon brought a suit against those of New Orleans, claiming the whole amount which they had themselves paid, on the ground of its being a reinsurance, or a proportional contribution, on the ground of its being a double insurance. It was held not to be a reinsurance, for the reason that it was not expressed or intended to be such; and not to be a double insurance in respect to the New Orleans policy, because, by the terms of that policy, it could not be so.<sup>2</sup> The settlement of the loss under the Louisiana policy was for the excess of the value of the cotton over the amount insured in London, thus negating its being a double insurance in respect to that policy.

370. *Where the aggregate amount of all of the insurances exceeds the valuation of the subject in the last policy, and there is*

<sup>1</sup> *Columbian Ins. Co. v. Lynch*, 11 Johns. N. Y. 233.

<sup>2</sup> *Alliance Ins. Co. v. La. State Ins. Co.* 8 La. 11.

*not besides the aggregate proportions insured by the prior policies an adequate proportion for it, it is, in respect to such policy, a case of over-insurance.* That is, if the prior policies, being at a higher valuation, cover three quarters of the subject, at such valuation, the assured ought still to have the right to apply the last policy to the remaining quarter, though the amount insured in the prior policies may be equal to the valuation of the whole subject in the last policy, unless this construction is expressly negatived by some stipulation in the last policy. The parties to that policy should not be benefited or prejudiced by the valuations in other policies, but their rights and liabilities should surely be regulated by the valuation which they have agreed upon in their own contract.

Accordingly, where £6000 was insured on a vessel valued at £8000, and in a subsequent policy £600 was insured on the same vessel valued at £6000, the last policy was not, upon the principle just stated, a case of double insurance, though the ruling by Lord Ellenborough to that effect, is not put upon that ground.<sup>1</sup> If any of the prior insurances are by open policies, the invoice value will be taken in those instead of a valuation, in determining the question of over-insurance.<sup>2</sup>

The rule just stated respecting over-insurance, will apply equally to any other policy than the last, the priority clause being out of the case. It is stated in respect of the last policy merely for the purpose of rendering the subject more readily understood.

371. It follows, and is not a matter of question, that *in case of divers policies on the same subject at different values, the aggregate may be an over-insurance in respect to some of them, and not so in respect to others.*

Where policies do not contain the clause relative to prior and subsequent policies, and where that clause is rendered inoperative by reason of the insurances being simultaneously made, the right

<sup>1</sup> *Bousfield v. Barnes*, 4 Campb. 228. The ruling, as reported, was against its being a double insurance, on the ground simply that the whole insurance did not exceed the real value, which would have justified the same ruling against its being a double insurance, though each of the valuations in policies had been £6000, which would be entirely to disregard the agreement as to the value by the parties themselves. For this reason the ruling in that case has been objected to in the former editions of this treatise.

<sup>2</sup> See *Kenny v. Clarkson*, 1 Johns. N. Y. 385.

of contribution can be claimed only by policies in respect of both or of all of which there is an over-insurance.

372. If the above propositions are correct, the result is, *that two insurances may be double in part in four different ways*: — 1. Where some of the assured, in either or both of them, are twice insured on the same interest in the same subject. 2. Where a party is doubly insured only on a part of his interest in a subject. 3. Where a party is doubly insured against some risks, and not against others, on his whole subject. 4. Where the same party is insured on the same interest, against the same risks, for a longer period in one policy than in the other.

In other words, if we dismiss entirely all stipulations and rules as to return of premium and apportionment of loss, and suppose two contracts of insurance to be enforced according to their obvious construction, the assured will pay a duplicate premium, and the insurers will pay a duplicate loss, in respect to some of the parties, or a part of the interest, or a part of the risks, or a part of the period, specified in one or both of the policies.

373. *Insurance by different parties on distinct interests in the same subject, not exceeding the values of the interests respectively, is not double insurance, though the aggregate of the insurances exceeds the value of the subject*:<sup>1</sup>

As in case of mortgager and mortgagee insuring independently of each other.

Goods were shipped by Meybohm, of Petersburg, to Amyand, of London, on an agreement that the proceeds should be applied in satisfaction of a balance due to the latter. Meybohm assigned the bill of lading to Tamesz, of Petersburg, to apply the proceeds in satisfaction of a balance due to him; the amount due to each being greater than the value of the goods. Insurances were made in London in behalf of each of them to the full amount of the shipment, the underwriters on Tamesz's interest having notice of insurance by other parties. In a suit on the policy for Tamesz, Lord Mansfield and his associates gave judgment for the full amount, on the ground that the insurances were for different parties on different interests; namely, on the respective interests of Amyand and Tamesz, and not on that of Meybohm.<sup>2</sup>

<sup>1</sup> *Warder v. Horton*, 4 Binn. Penn. 529.

<sup>2</sup> *Godin v. Royal Exch. Ass. Co.* 1 Burr. 489; 1 W. Blackst. 103.



The court did not decide the question of the right to possession of the goods between Amyand and Tamesz, nor that the same goods can be sold or pledged to two different parties so as to give to each a valid insurable interest to their full value. If either was considered to stand in place of Meybohm as principal, and the other as pledgee, the case is plainly within the rule as to mortgager and mortgagee, and each might insure to the full value. This construction is excluded by the court; and it does not appear upon what other the position taken by the court can be supported. It is doubted by Mr. Marshall.<sup>1</sup> But there is no doubt of the general doctrine asserted in the case, that where each of two parties, having distinct interests in a subject, to its full value, insures upon it to its full value, independently of the other, it is not a case of double insurance.

#### SECTION XVI. INTEREST IN REINSURANCE.

374. *Reinsurance is a contract whereby one party, called the "reinsurer," in consideration of a premium paid to him, agrees to indemnify the other against the risk assumed by the latter, by a policy in favor of a third party.*

375. *Every insurer has an insurable interest for reinsurance.*

376. *The reinsurance may be against all or a part of the risks that have been assumed by the reinsured in the original policy in which he is the insurer. Underwriters on a time policy may re-insure on a particular voyage, but the time and risks covered must not exceed those covered by the original policy.*<sup>2</sup> Reinsurance may cover a prior loss if so expressed in the policy.<sup>3</sup>

377. *Reinsurance is an illustration of the distinction between an "insurable interest" and ownership. An underwriter, by subscribing a policy, acquires no property in the subject insured, yet he acquires an insurable interest, and, having rendered himself directly liable to loss from certain perils, may stipulate to be indemnified against those perils. His interest, however, exists only in relation to the perils against which he has insured in the original policy.*<sup>4</sup>

<sup>1</sup> Insurance, 2d ed. 152.

<sup>2</sup> Philadelphia Ins. Co. v. Washington  
Ins. Co. 23 Penn. St. 250.

<sup>3</sup> Philadelphia Ins. Co. v. American  
Ins. Co. 23 Penn. St. 65.

<sup>4</sup> Commonwealth Ins. Co. v. Globe  
Ins. Co. 35 Penn. St. 475.

The English law forbids reinsurance, "unless the insurer shall be insolvent, become bankrupt, or die;"<sup>1</sup> and this statute is construed to extend to reinsurance of foreigners.<sup>2</sup> It is allowed in France, and is common in the United States.<sup>3</sup>

378. *A common carrier, or other party answerable to another for certain risks upon a subject, may be reinsured against those risks, subject to the same rules and exceptions, such as illegality, his own misconduct, &c., as in original insurance.*<sup>4</sup>

Thus, the owners of a vessel, answerable for any loss by the fault of boatmen employed in bringing a cargo from the shore, may insure the goods against that risk.<sup>5</sup>

The owner, having sold his vessel subject to a stipulation that he is to bear certain risks, may protect himself against those risks by insurance, on the principle of reinsurance.<sup>6</sup>

The reinsurers having procured the assignment of the subject of the original insurance or the extinguishment of that insurance; the reinsurance was held by the Vice-Chancellor to be thereby cancelled; but a contrary decision on the same state of facts was made in the Court of Exchequer Chamber, the court holding that in life assurance no interest was necessary at the time of the death.<sup>7</sup>

<sup>1</sup> 19 Geo. II. c. 37.

<sup>2</sup> *Andree v. Fletcher*, 2 Term, 161.

<sup>3</sup> *N. Y. Bowery Ins. Co. v. N. Y. Fire Ins. Co.* 17 Wend. N. Y. 359.

<sup>4</sup> *Crowley v. Cohen*, 3 Barnew. & Ald. 478.

<sup>5</sup> *Walker v. Maitland*, 5 Barnew. & Ald. 171.

<sup>6</sup> *Barr v. Gibson*, 5 Mees. & W. Exch. 390.

For subject of amount of insurable interest, see vol. 2, ch. 20, § 1741 a.

<sup>7</sup> *India & London L. Ass. Co. v. Dalby*, 4 De Gex & S. Ch. 462, 7 Eng. L. & Eq. 250; *Dalby v. India L. Ass. Co.* 15 C. B. 365, 28 Eng. L. & Eq. 312.

## CHAPTER IV.

### THE PARTIES TO AN INSURANCE. — DESCRIPTION OF THE ASSURED.

379. *ONLY those interested in the subject at the commencement of the risk under the policy, can be original parties to the policy,*<sup>1</sup> and they continue to be parties only while they have an interest. Others may become parties by stipulation or transfer, either with them or in their stead.

380. *Insurance made by a person in his own name only, without any indication, in the policy, that any other is interested, can be applied only to his own proper interest in the subject, or his interest as trustee, &c.* In other words, a contract with A cannot be construed to be a contract with B.<sup>2</sup>

Thus, insurance by one part-owner of a ship in his own name merely, is not applicable to the interest of the others :<sup>3</sup>

So, if A is insured, "by his agent B," the policy covers only the interest of A,<sup>4</sup> and not that of A and his partner :

So, if one of the two shippers, to whom the same shipment belongs in common, effects a policy in his own name, where only his share of the shipment is at his risk.<sup>5</sup>

So a policy effected by the mortgagee in his own name does not issue to the benefit of the mortgager.<sup>6</sup>

381. So, conversely, *an insurance of A and B jointly, as copartners or otherwise, has been held, in England, not to be applicable to the sole interest of one, where the other has no interest in the subject.*<sup>7</sup>

<sup>1</sup> Perchard v. Whitmore, 2 Bos. & P. 155, n.

<sup>2</sup> Watson v. Swann, 11 C. B. N. S. 756.

<sup>3</sup> Finney v. Bedford Ins. Co. 8 Metc. Mass. 348.

<sup>4</sup> Dumas v. Jones, 4 Mass. 647.

<sup>5</sup> Graves v. Boston Mar. Ins. Co. 2 Cranch, 419.

<sup>6</sup> White v. Brown, 2 Cush. Mass. 412; Kemble v. Rhinelander, 3 Johns. Cas. N. Y. 130. See also Pearson v. Lord, 6 Mass. 81, and Russell v. N. E. Marine Ins. Co. 4 Mass. 82.

<sup>7</sup> Bell v. Ansley, 16 East, 141; Cohen v. Hannam, 5 Taunt. 101.

382. In many policies the *assured* is so described that any person may be comprehended, and avail himself of the contract, by proving his interest, and showing that the policy was intended for him.

Different forms of expression are adopted for this purpose. In England, insurance appears to be made most frequently in the name of the broker, who causes himself to be insured on an interest, "as well in his own name as in the name and names of all persons whatsoever to whom the same may in any way appertain."

The same form is often used in the United States, and also a shorter one of like import, in which the party effecting the policy is insured for "himself and whom it may concern."

At Marseilles, the policy was formerly expressed to be made for "such person as should be thereafter named."

At Hamburg, the losses under a policy were made payable to "the bearer."<sup>1</sup>

Other general forms of expression of similar import have been used at different places for the same purpose, from early times.<sup>2</sup>

By these forms the assured might be concealed from the knowledge of the underwriter, and they were equivalent to the practice of subscribing policies in blank, as was formerly done at Marseilles,<sup>3</sup> and also in England.<sup>4</sup> The practice of insuring for whom it might concern, was adopted, says Emerigon,<sup>5</sup> for the purpose of concealing the name of the party interested, and keeping his commercial enterprises secret. On this account the insurers in England complained, that "policies were so loose that an underwriter had no opportunity of knowing the nature of the thing insured, or who the persons were for whom he insured."<sup>6</sup> Accordingly, a statute was made in 1785, prescribing the manner in which the assured should be described in the policy.<sup>7</sup> This statute was intended to secure to the underwriter a knowledge of the person with whom he was contracting. But soon after it went into operation, an underwriter took advantage of it to evade his

<sup>1</sup> Ord. of Hamb. tit. 1, s. 4, 2 Mag. 211.

<sup>2</sup> Le Guidon, c. 2, a. 6; 2 Saund. 6, n. 1.

<sup>3</sup> Emerigon, tom. 1, p. 47, c. 2, s. 4.

<sup>4</sup> Pray v. Edie, 1 Term, 313.

<sup>5</sup> Chap. 11, s. 4.

<sup>6</sup> Pray v. Edie, 1 Term, 313.

<sup>7</sup> 25 Geo. III. c. 44; 1 Bos. & P. 352, n.; Stat. 14 Geo. III. c. 48, § 2; Hodson v. Observer L. Ass. Soc. 8 Ell. & B. 40.



contract, on the ground that the agent, in whose name the insurance had been effected, was not described as such in the policy. In that case, Lord Mansfield intimated a doubt of the expediency of the law.<sup>1</sup> Another policy was evaded under the same law, because it was made for W. Wilton, and "the other owners," they not being named.<sup>2</sup> Another statute was then made which required only the name of the person interested, or that of his agent, to be inserted.<sup>3</sup> As the agent needs not to be described as such under this statute, it does not secure to the underwriter a knowledge of the party actually interested.<sup>4</sup> This was in effect repealing the first statute, and no reason appears why it should not be repealed; since the inconvenience, if any existed, seemed to be very much within the power of the underwriters to remedy.

Where an agent holds goods, of which he does not know the actual owner, as in case of the commissioners of the Dutch prizes,<sup>5</sup> and where one agent consigns goods to another, without advising the consignee that he holds them as agent,<sup>6</sup> the consignee may be able to give the underwriters information of all the facts material to the risk; yet, if such a law were in force as that first above referred to, he could not insure.

383. *A policy made in the name of a particular person "for whom it may concern," or with any other equivalent clause, will be applied to the interest of the party or parties, and only the party or parties, for whom it is intended by the person who effects or orders it, if such party has authorized its being made beforehand, or subsequently adopts it.*<sup>7</sup>

It has been held in Louisiana, that a policy effected by an agent without an order or adoption before notice of loss by his principal, who is fully insured on the same subject in a foreign country, cannot after notice of loss be adopted and availed of as an over

<sup>1</sup> Pray v. Edie, 1 Term, 313.

<sup>2</sup> Wilton v. Reaston, Park, 20.

<sup>3</sup> 28 Geo. III. c. 56.

<sup>4</sup> De Vignier v. Swanson, 1 Bos. & P. 346, n.; Wolff v. Horncastle, 1 Bos. & P. 316.

<sup>5</sup> Lucena v. Craufurd, 3 Bos. & P. 75.

<sup>6</sup> Russell v. N. E. Marine Ins. Co. 4 Mass. 82.

<sup>7</sup> Lambeth v. Western Fire & Mar. Ins. Co. 4 Rob. La. 235; 11 id. 86; Cobb v. New England Ins. Co. 6 Gray, Mass. 192. A policy to "K. and others" may be shown by parol evidence to be for a company to whom K. has sold his interest. Shawmut Co. v. Hampden Ins. Co. 12 Gray, Mass. 540. See also Sanders v. Hillsborough Ins. Co. 44 N. H. 238.

or double insurance, in favor of a claim by the foreign insurers for a proportional reimbursement to them of the loss,<sup>1</sup> the insurance not having been intended as an over or double insurance to be so applied.

It has been remarked in favor of policies for whom it may concern, that "What is an insurable interest is a question of some difficulty. Hence the advantage of a general form in naming the assured, and extending the effects of the insurance as far as the contract may be found to have been authorized by mercantile usages; thus comprising the cases of consignees, factors, trustees, and agents, and persons having a qualified interest in the property."<sup>2</sup>

In a New York case, *Jones, C. J.*, speaks of this form of policy as not being in use in insurance against fire,<sup>3</sup> but it is a frequent practice in Boston to make fire policies in this form; and such are, it seems, made at New Orleans.<sup>4</sup>

The phrase "whom it may concern," is a technical one, and is understood to mean, not anybody who may have an interest in the thing insured, but only such as are in contemplation of the parties making the contract. Such a policy supposes an agency, and, proceeding on that ground, looks only to the principal in whose behalf, or on whose account, the agent moves in the transaction, and he for whose benefit the insurance is procured is the person in the contemplation of the parties,—is he whom alone it "concerns."<sup>5</sup>

A foreigner may be a party under such general description.<sup>6</sup>

A part-owner of a cargo worth ten thousand dollars, his interest being one half, effected insurance in his own name, and for "every person whom," &c., and on capture and condemnation of his half, and the acquittal of the other part-owner's, the question arose in the Supreme Court of New York, whether he was the sole assured, or he and the other part-owner were

<sup>1</sup> *Alliance Mar. Ins. Co. v. La. State Ins. Co.* 8 La. 11.

<sup>2</sup> *Lee v. Massachusetts Fire & Mar. Ins. Co.* 6 Mass. 208, per Sewall, J.

<sup>3</sup> *De Forest v. Fulton Fire Ins. Co.* 1 Hall, N. Y. 112.

<sup>4</sup> *Alliance Mar. Ins. Co. v. La. State Ins. Co.* 8 La. 11.

<sup>5</sup> *Newson v. Douglas*, 7 Harr. & J. Md. 417. See also *Cox v. Parry*, 1 Term, 464; *Haynes v. Rowe*, 40 Me. 181; *Crosby v. New York Ins. Co.* 5 Bosw. N. Y. 369.

<sup>6</sup> Per Story, J., in *Seamans v. Loring*, 1 Mas. C. C. 128.

jointly insured. If he only was insured, the total loss was five thousand dollars; if both were parties to the policy, it was twenty-five hundred dollars. This question was determined by the evidence of his intention, both from the terms of the policy itself, and aliunde.<sup>1</sup>

However general may be the description of the parties, no part of the amount insured can be applied in behalf of any other party than those intended, though the nominal assured consents so to apply it.<sup>2</sup> An obvious, conclusive objection to such application is, that an assured might so have the election to apply his policy to the interests of any uninsured parties who had met with losses within the risk specified, upon such terms as he could make; and if he found no such, he might demand a return of premium.

384. *The intention of the party who orders the policy determines who are the "concerned" under a general description; though those intended are not known by the broker who effects the policy, or by the insurers, to be so.*<sup>3</sup>

385. *The rule, that an insurance "for whom it may concern," will avail in behalf of the party for whom it is intended, does not mean that any specific individual must be intended.* It is enough that the agent, and the insurers, intend it for any party or parties who have an insurable interest. If the insurance is ordered, then its application is governed by the intention of the party who originally gives the order; if it is not ordered, its application will be to the interest of the party intended by the one effecting it, whether himself or another. But he may intend it for whatever party shall prove to have an insurable interest in the specified subject, in which case it will be applicable to the

<sup>1</sup> *Lawrence v. Sebor*, 2 Caines, N. Y. 203. The court were divided on the mixed matter of law and fact, three of the judges being of opinion that a joint insurance was intended, and two, viz., Kent, C. J., and Thompson, J., that it was intended to be on the separate interest of the nominal assured, such being, in their opinion, the more obvious construction of the policy. See also *Lawrence v. Van Horn*, 1 Caines,

N. Y. 276, where the same question occurred on a similar policy.

<sup>2</sup> *Bauduy v. United Ins. Co.* 2 Wash. C. C. 391. See also *Fierson v. Brenham*, 5 La. Ann. 540; *Augusta Ins. Co. v. Abbott*, 12 Md. 348.

<sup>3</sup> *Buck v. Chesapeake Ins. Co.* 1 Pet. 151; *Newson's Adm'r v. Douglas*, 7 Harr. & J. Md. 417. See also *Seamans v. Loring*, 1 Mas. C. C. 128.

interest of any person subsequently ascertained to have such an insurable interest, who adopts the insurance.<sup>1</sup>

A valid insurance may, therefore, be made between parties, both of whom are at the time ignorant of the specific persons to whose interest it is applicable.<sup>2</sup>

386. *An insurance on a subject expressed to be "on account of the owners," will cover the interest of all, or a part, of the owners, as it may have been intended; but of no other than owners.*

The application of the term "owners" in such case is open to explanation by extrinsic evidence. And where one of the "owners," for whom the policy, on a ship and cargo, was intended, transferred a part of his interest, namely, a sixth of the whole, after the policy was effected but before the cargo was put at risk, the insurance was held to be applicable to the five sixths belonging to the parties for whose account the insurance was intended.<sup>3</sup>

In another case the master instructed F., as agent, to insure \$1000 on cargo "on account of owners;" he effected a policy on cargo to that amount, for the owners of the brig S. There were three owners of the brig. Of the cargo \$456 belonged to the three in common, and \$317 to one, and \$142 to another, separately. The question was, whether the policy was applicable to the master's interest only, or to that of all three, both joint and separate. Extrinsic evidence was admitted to determine the application of the policy; which was applied to the master's interest only, on the ground that he had no authority as part-owner or otherwise to order insurance for the other part-owners, and that the insurance had not been adopted by them.<sup>4</sup>

In this case it appears from the amount insured to have been the intention to insure on account of all the owners. And the demand made in the suit for this application of the policy shows that it had been adopted by the other two owners. The case,

<sup>1</sup> *Duncan v. Sun, &c. Ins. Co.* 12 La. Ann. 486.

<sup>2</sup> This appears from *Lucena v. Craufurd*, and the other insurances effected by commissioners on the Dutch vessels seized provisionally by order of the British government; and also from

*Hurlbut v. Pacific Ins. Co.* 2 Sumn. C. 471.

<sup>3</sup> *Catlett v. Pacific Ins. Co.* 1 Paine, C. C. 594; S. C. 1 Wend. N. Y. 561; S. C. 4 Wend. N. Y. 75.

<sup>4</sup> *Foster v. United States Ins. Co.* 11 Pick. Mass. 85.



therefore, seems to be inconsistent with the doctrine established by the authorities; and the decision does not accord to the terms of the policy.

387. *The term "owners," and phrase "whom it may concern," as we have seen, are usually understood to have reference to those who are concerned at the date of the policy, or at the commencement of the risk; but a policy expressed to be on account of the owners, or whom it may concern, "at the time of the loss," will be available to such, on proof of interest, though the subject, and with it the policy, may have passed through divers assignments.*<sup>1</sup> By this provision, accordingly, the policy was considered to be made assignable with the subject without the consent of the underwriters.

388. *One may become a party to an insurance effected in his behalf, in terms applicable to his interest, without any previous authority from him, by adopting it, either before or after a loss has taken place and is known to him,*<sup>2</sup> though the loss may have happened before the insurance was made.<sup>3</sup>

389. *The adoption of a policy by the party in whose behalf it was effected, needs not to be in any particular form.* The bringing of a suit, or being a party to one, upon a policy, has been held in Massachusetts to be a sufficient adoption of it.<sup>4</sup>

A contrary decision was made in Pennsylvania. In a suit by A on a marine policy, expressed to be made by B "for A, as well in his own name as for and in the name of all and every person or persons, to whom the property insured does, may, or shall appertain," it was held that he could not recover, because it did not appear that he had authorized or adopted it.<sup>5</sup> But the better doctrine appears to be as above.

<sup>1</sup> *Rogers v. Traders' Ins. Co.* 6 Paige, Ch. N. Y. 583.

<sup>2</sup> *Lucena v. Craufurd*, 1 Taunt. 325, 5 Bos. & P. 269; *Routh v. Thompson*, 13 East, 274; *Steinback v. Rhinelander*, 3 Johns. Cas. N. Y. 281, per Kent, C. J.; *Watkins v. Durand*, 10 Ala. 251; *Barlow v. Leckie*, 4 J. B. Moore, 8; *Finney v. Fairhaven Ins. Co.* 5 Metc. Mass. 192; *Pouverin v. La. State Ins. Co.* 4 Rob. La. 235; *Hagedorn v. Oliverson*, 2 Maule & S. 485; *Holland*

*v. Smith*, 6 Esp. 11; *Mickles v. Rochester City Bank*, 11 Paige, Ch. N. Y. 118.

<sup>3</sup> *Bridge v. Niagara Ins. Co.* 1 Hall, N. Y. 247. In French jurisprudence the adoption must, it seems, be before notice of loss. *Alauzet*, A. D. 1843, tom. 2, pp. 223, 224.

<sup>4</sup> *Finney v. New Bedford Ins. Co.* 8 Metc. Mass. 348.

<sup>5</sup> *De Bolle v. Pennsylvania Ins. Co.* 4 Whart. Penn. 68.

A policy was effected in London by H., in August, 1810, for S., a Danish subject, on a voyage from Gluckstadt to Great Britain, without any previous authority for that purpose, and the cargo insured was lost by capture about the time when the policy was made, and it did not appear that S. adopted the policy until July, 1812. Such adoption was held to be equivalent to a previous authority.<sup>1</sup>

390. *Where one without order or authority effects insurance intended partly or wholly for another in a form available to him and applicable to his interest, such other has an election to be a party to the policy or decline it. But he will become a party after notice, and, as such, liable for the premium, unless he declines to be so without unnecessary delay.*<sup>2</sup>

391. *In order to render an insurance effected by one partner or part-owner, applicable to the interest of the copartners or other part-owners, it is not enough that the partnership, by its terms and extent, authorizes the insurance on joint account, or that it is specifically authorized beforehand, or subsequently ratified. It is also necessary in this, as in other cases, that the terms of the policy should be such as to be applicable to the joint or common interest.*

Mr. Chief Justice Kent says: "There can be no doubt that a partner has such interest in the entirety of the cargo as to enable him separately to insure it, and that an averment that he had an interest in the property to the amount of the insurance, is supported by proof of a partnership interest to that amount."<sup>3</sup> But he thought, if the partnership was confined to a particular adventure, one partner could not insure the whole property in his own name. This distinction is difficult of application, since every partnership is more or less limited, and it would not be easy to say how general it must be, to give each partner an insurable interest in the partnership property to its full value.

Chief Justice Marshall makes no such distinction. He says: "Under no rule of proceeding on a special contract could the interest of a copartnership be given in evidence on an averment

<sup>1</sup> Hagedorn v. Oliverson, 2 Maule & S. 485.

<sup>2</sup> Such is the law in France, Emer. tom. 1, p. 144, c. 5, s. 6, and ours is no doubt the same.

<sup>3</sup> Lawrence v. Sebor, 2 Caines, N. Y. 203. See also Holmes v. United Ins. Co. 2 Johns. Cas. N. Y. 329.

of individual interest, or the averment of the interest of a company be supported by a special contract relating in its terms to one individual.”<sup>1</sup>

This I understand to be the established doctrine.<sup>2</sup> And it is merely the application to this contract, of a rule common to this and others.

392. *If a party has an interest in a subject in different capacities*, as where he is owner of a certain proportion, and trustee of the remainder, *he may insure both interests in his own name, under a merely general description of the subject, provided his interest, other than as absolute owner, is such, that he might insure it in his own name without a particular specification of it:*<sup>3</sup>

As in a case before Gibbs, C. J., and his associates in the English Common Pleas, on a policy on cargo “by order and on account of D.,” who owned seven sixteenths, and had a lien for advances on the remainder.<sup>4</sup>

So a fire policy on a building described by the assured to be “his mill,” was held to be applicable to his interest both as owner and mortgagee.<sup>5</sup>

It is otherwise held in a New York case by Lewis, C. J., and his associates,<sup>6</sup> but the better doctrine both on principle and authority is as above.

393. *If a party insured in his own name has or expects an interest in different capacities, or expects an interest in one capacity as that of owner, and proves to have one in a different capacity, as that of trustee, consignee, &c., is he conclusively entitled and liable to be considered as an assured, in respect to any one or more interests to which the policy is, by its terms, applicable? or may he or others determine the application of the policy by proving his intention?*

In other words, whether the application of the policy to one or another interest, or to divers interests, in such case depends upon

<sup>1</sup> Graves v. Boston Mar. Ins. Co. 2 Cranch, 440.

<sup>4</sup> Carruthers v. Sheddon, 6 Taunt. 14; S. C. 1 Marsh. 416.

<sup>2</sup> See Pearson v. Lord, 6 Mass. 81; Kemble v. Rhinelander, 3 Johns. Cas. N. Y. 130.

<sup>5</sup> Lawrence v. Columbian Ins. Co. 2 Pet. 25; and Irving v. Richardson, 2 Barnew. & Ad. 192.

<sup>3</sup> See Hiscox v. Barrett, cited 16 East, 145. Murray v. Columbian Ins. Co. 11 Johns. N. Y. 302, is contra.

<sup>6</sup> Murray v. Columbian Ins. Co. 11 Johns. N. Y. 302.

the intention, just as the application of a policy for whom it may concern, in favor of one or another party, depends upon the intention?

The rule on this subject must be uniform, whether it operates in particular cases in favor of one or another party; for it may operate against the assured in a question respecting a return of premium where there has been no loss, if he is conclusively presumed to have insured whatever interest he might have; and the same conclusive presumption operates against the underwriter in case of loss. If the assured may prove that the policy was intended for an interest which he never realized, for the purpose of recovering back his premium, the underwriter must, in like manner, have the liberty, in order to avoid liability for a loss, of proving that the policy was not intended for the interest on which the assured makes his claim.

The jurisprudence on this subject is contradictory. In respect of a claim for return of premium, it was held by a majority of the court in New York, that the assured might entitle himself to a return by showing that the policy was made through mistake, the party who effected it having no interest himself and no authority to insure for others, who were named in the policy as assured. Mr. Justice Kent dissented.<sup>1</sup>

In a case in an English court, a cargo was consigned to C. as purchaser, with orders to pay the price to W., the general agent of the consignor, the balance in whose favor exceeded the amount of the shipment. The bill of lading and invoice were transmitted to W., with orders to deliver them to C., that he might get insurance, on his accepting a bill for the price. C. refused the consignment. Thereupon W. effected a policy, as well in his own name as for and in the name of every other person to whom the same might appertain. It was held by Buller, Heath, and Rooke, Justices, that the policy could be applied either to the interest of W. or to that of the consignor.<sup>2</sup>

In a case before Savage, C. J., and his associate justices of the Supreme Court of New York, the owner of five sixths of a ship effected insurance upon it in his own name, the space in the

<sup>1</sup> Steinback v. Rbinelander, and same plaintiff v. Church, 3 Johns. Cas. N. Y. 269.

<sup>2</sup> Wolff v. Horncastle, 1 Bos. & P. 316.



policy for inserting "for whom it may concern," or the names of other parties, being left blank, intending that the owner of the other sixth should be interested in like proportion in the policy, in case he should take the same proportion of the cargo, which he declined to do. On a loss having been paid to the assured of the whole amount insured on the ship, not exceeding the value of the assured's five sixths, the other part-owner claimed one sixth of the amount paid. The court rejected his claim.<sup>1</sup>

The intention of insuring for the benefit of the owner of the one sixth was, at the most, merely conditional. The court, however, in deciding the case, put it upon the general ground, that no addition to, or interpolation in, the policy can be made, on parol testimony; in other words, that in such case the amount of the assured's interest to which the policy is applicable cannot be determined, by proof of intention, to be different from what the policy itself imports.

In other cases a contrary doctrine is maintained, namely, that the application of an insurance expressed in the policy to be by or for a particular party, is to be applied to one, or another, or all of the different interests he may have in the subject, to which the policy, by its terms, may be applicable, according to the intention in effecting it; which intention may be proved aliunde.

An assured effected a policy on a cargo from Virginia in his own name merely, expecting one to be shipped by his agents there. They shipped and consigned to him a cargo on their own account and risk, for the voyage described, on the proceeds of which, after the same had come into his hands, he would have had a lien for his balance of account. He received notice of the shipment, and of the loss of the cargo, and orders to insure it, at the same time. It was decided in Massachusetts, that he could not avail himself of his policy on his interest as consignee entitled to a lien, on the ground that he had intended its application to his expected interest as owner.<sup>2</sup>

So in a case in the K. B. in England, advances being made by consignees in Liverpool on a cargo of wheat and pease from New York, they made insurance upon it in their own names "as interest might appear." The cargo was detained by the Ameri-

<sup>1</sup> *Turner v. Burrows*, 5 Wend. N. Y.      <sup>2</sup> *Toppan v. Atkinson*, 2 Mass. 365.  
511.

can embargo of December, 1807. The assured charged the premium to the consignors. Lord Ellenborough and his associates decided against the claim of the assured for a loss, on the ground that they could not recover on the interest of the consignor, since the act of his government in imposing the embargo was imputed to him, and he could not be indemnified against his own acts; and that they could not recover on account of their own interest, on the ground, "that, where a policy is effected in behalf of a consignor, the consignee is not at liberty to apply it to his own interest."<sup>1</sup> In other words, it might be shown by evidence aliunde, namely, the charging of the premium, that the insurance was intended on account of the consignor, and being so intended the assured could not apply it to their own interest.

So in another case, it was held by Lord Tenderden and his associates, that the application of a policy, made in the name of a mortgagee, to his interest only, or to his and also that of the mortgager, that is to say, to the whole value of the subject, depends upon his intention.<sup>2</sup> The court considered that he was authorized to insure the full value.

The question we are examining has been elaborately discussed by Judge Duer,<sup>3</sup> who concludes, "*that except in cases of fraud or misrepresentation, an inquiry into the specific interest that a party effecting a policy in his own name meant to insure, is never to be permitted.*" That is to say, if the assured has an interest, of whatever species, answering to the description of the subject in the policy, and at risk within the description of the risks, he is liable for the premium, and the underwriters are liable for the loss, whatever may have been his intention as to the species of interest to which the policy was to be applied.

It is not easy to say on which side of this question is the greater weight of judicial authority. The application of the policy to one or another interest of the same party is subject to greater objections than its application to a third party under the clause "for whom it may concern;" since the underwriter has notice by the terms of the policy of the interest of a third party,

<sup>1</sup> Conway v. Gray, 10 East, 536, and Conway v. Forbes, 10 East, 539. See also Donath v. Ins. Co. of North America, 4 Dall. 463.

<sup>2</sup> Irving v. Richardson, 2 Barnew. & Ad. 193.

<sup>3</sup> Marine Insurance, Vol. II. p. 39, &c. Lect. 9, s. 26-29.

whereas in a policy in favor of a party named, without more, he has no such intimation. This renders it a case more proper for a rigid construction according to the terms of the policy, which would exclude all evidence of intention, whether offered on the part of the assured or the underwriters, to divert the policy from an application to whatever subject or interest it is applicable to by its terms. I, accordingly, concur with Judge Duer in the above doctrine.

394. Where *the policy* is on a subject generally, without specifying the interest particularly, it *will still be available to the assured, though he changes his interest to one*, in the same subject, *that would be covered under a like general designation*, as where his interest as owner is changed to that of mortgagee.<sup>1</sup>

395. In a *policy for an owner and party having a lien*, the policy is *applied to the interest of each commensurately with its amount*.<sup>2</sup>

396. In case of a policy by which divers parties are insured on distinct interests, the question arises as to their remedies being distinct, to the same effect as if the insurance had been by separate policies. *There evidently are difficulties in the way of divers actions at law by divers parties insured in one policy under the description "for whom it may concern."* But if the same policy insures different individuals certain amounts, each on the same or on different subjects, *the policy itself purports to contain divers distinct contracts*, which are the *subjects of distinct independent remedies at law*.

Where two persons were insured on a life in the same policy, it was held that they might have separate remedies.<sup>3</sup>

397. *A debtor who pays a premium on a policy on his life made in the name and in favor of his creditor*, as collateral security, and the owner of any subject pledged and so insured, *has an interest in the policy*, though he is not directly, in express terms, or by description in the policy, a party to it.

A debt having been paid by the debtor's executor, Lord Ellenborough ruled that the executor of the creditor should pay over

<sup>1</sup> Stetson v. Mass. Fire & Mar. Ins. Co. 4 Mass. 330; Bell v. Western Mar. & Fire Ins. Co. 5 Rob. La. 424.

<sup>2</sup> Paradise v. Sun Ins. Co. 6 La. Ann. 596.

<sup>3</sup> M'Cormick v. Ferrier, Hayes & J. Exch. Ir. 12.

the amount received on account of a loss on a policy made by his testator, on the debtor's life, the premium for which he had charged to the debtor.<sup>1</sup>

In a case of a life insurance by a creditor, Sir Thomas Plumer decreed that the representatives of the debtor were indirectly interested in the policy, though he did not pay the premium, and was not privy to the policy. The debtor and his wife had assigned to two of his creditors her right to four hundred dollars in case of her surviving her mother, as collateral security, surplus, if any, payable to the debtor. She died first, and a loss was paid to the two creditors. On the insolvency of the debtor, they claimed to prove their whole demands against his effects in the hands of the assignees. The Vice-Chancellor decreed that they should deduct the net amount received from the insurers.<sup>2</sup> That is, the creditors being trustees of the contingent right so assigned to them, he considered them as having effected the insurance in that capacity. The decision is questionable, however, as it does not appear that they could have charged the premium to the debtor, which they could have done if the insurance had been authorized in their capacity of trustees. The construction alternative to that put by the Vice-Chancellor is, that, in case of surplus over their demands by the dividends and amount received on the policies, they would have been accountable to the insurers for it in the nature of salvage.

398. *Under a policy in the name of the mortgagee "for whom it may concern," the same being, in fact, for the benefit of the mortgagee to the amount of his interest, surplus, if any, on account of the mortgager, both the mortgagee and mortgager are parties to the policy and "assureds."*

In a policy on freight effected in the name of the assignees of "the freight list," expressed to be "for whom it might concern," on their own account, and on that of the assignor, who was owner of the vessel, barratry of the master was insured against, "unless the assured was owner of the vessel." The question arose, whether this exception was applicable to the assignees of the freight list, to whom it had been assigned as security for advances, it being agreed by the parties at the same time, that

<sup>1</sup> *Holland v. Smith*, 6 Esp. 11.

410; S. C. 1 Madd. Ch. 572; S. C.

<sup>2</sup> *Ex parte Andrews*, 2 Rose, Bank. Ellis, Ins. 157.



the assignees should insure for their own account to the amount of their advances, surplus, if any, for account of the assignor. The premium was charged to the assignor, and any payment of loss on the policy, and other policies assigned to the same assignees, was to go in discharge of the balance due from him. It was held in Louisiana that the assignees of the freight were to be considered the "owners of the vessel" in reference to this exception, and that under the policy was to have the same construction in this respect as if it had been in the owner's name; on the grounds, first, that the policy on cargo, which the owner had assigned to the same assignees in the same instrument, had been ordered by him to be insured on his own account; second, that, under the circumstances, the intention was to insure exclusively on account of the shipowner; third, that the assignees stood in place of the assignor who was shipowner; fourth, because the whole proceeds of the policy were to go for the benefit of the shipowner, in discharge of his liability for advances, and by payment over of the surplus, if any, to him; fifth, that they must take his right to freight subject to his liability; sixth, that, though the insurance should be construed to be on account of the assignee as well as the assignor of the freight-list, the policy was indivisible, and, accordingly, if the exception of barratry was valid against the assignor, it was so against the assignees; seventh, that as no disclosure was made to the underwriters, of the particular agreement between the shipowner and the nominal assured, "they had just reason to suppose that they were dealing with the owners of the vessel, or with parties closely associated in interest with him," which was assumed to be in favor of putting the same construction upon the policy as if it had been expressed to be effected for the sole benefit of the shipowner; eighth, that from various correspondence and transactions between the shipowner and his agents, it appeared that the policy was intended by them to be applied to the interest of the former.<sup>1</sup>

Most of these positions of the court involve questions of fact.<sup>2</sup>

<sup>1</sup> *Paradise v. Sun Mutual Ins. Co.* 6 La. Ann. 596. when a case is in the stage in which the above opinion was given, the court may

<sup>2</sup> According to the judicial system and practice in Louisiana, it seems that take cognizance of the facts and make inferences from those proved, in a man-

In respect to the assignee being in place of the assignor and subject to his liability, the doctrine is applicable as between the shippers and the assignees of the freight-list, but not necessarily so between such assignee and his underwriters. Whether the liability of ownership of the vessel in respect of third persons is imputable to a party having an interest in the proceeds of the freight-list, will, it seems, to many purposes at least, depend upon his supplying the provisions, appointing the master, employing and paying the men, and having control of the vessel.<sup>1</sup> And it does not appear that the same question is otherwise determined in respect to underwriters. If the same doctrine affects them, as it seems to do, and there is nothing in writing to determine who are owners in respect to them, the question turning wholly upon the construction of the word "owners," then it is resolved into a matter of fact for the jury. The question of presumption, or not, belongs to the court. It seems, however, to be questionable whether there is a presumption that an applicant for insurance on freight is owner of the vessel, and if there is such a presumption, it can be at most but *primâ facie*, and subject to be rebutted, which would still bring the case to the jury. The fourth and sixth grounds of the decision are substantially that both the assignor and assignee of the freight were parties to the policy, and both had a direct interest in recovering the loss, and, therefore, that the owner as well as the assignee of the freight-list, came within the description of "the assured," to the same effect in putting a construction upon the policy as if they had been both of them expressly named in the policy as the parties insured. This construction seems to be a proper one, and, indeed, free of all doubt. It cannot be supposed that the exception of the risk of barratry takes effect only in

ner equivalent to the ordinary practice in courts of law where a case is reserved with express authority to the court to decide on the evidence and make all the inferences from the facts proved which a jury might make.

<sup>1</sup> *Thorn v. Hicks*, 7 Cow. N. Y. 797, where the party having the control and use of the ship under an agreement to purchase it, is held to be owner as to

third persons; and *Reynolds v. Toppan*, 15 Mass. 370, where the charterer who took the vessel on shares is held to be so, and see *Abbott on Shipping*, by Story, p. 19, and note; *Parsons on Contracts*, 657. The management and control of the vessel, in the above case of *Paradise v. Sun Mut. Ins. Co.* appears to have remained with the owner.

case of all the assureds, who are interested in recovering the same loss, being owners of the vessel; therefore *under the clause excepting the risk of barratry "if the assured be owner," that risk is excepted if either of the parties insured is so.*

399. *A mortgager who assigns his policy as collateral security to the mortgagee, continues to have an interest in the policy, as long as he has a right to redeem,<sup>1</sup> or is liable for the debt.<sup>2</sup>*

400. *So where a judgment creditor, having a lien on real estate, effects insurance thereon for himself and the debtor, the latter has an interest in the policy, of which he may avail himself on satisfying the judgment.<sup>3</sup>*

401. *Where a depositary insures the deposited property, in his own name, in pursuance of an agreement with the depositor to insure it for the benefit of the latter, the depositor, as between these two and the creditors of the depositary, will have an equitable interest in the policy, equivalent to that of the assignee of a chose in action.<sup>4</sup>*

402. *A tenant who pays no part of the premium has no interest in a policy effected by the landlord on the leased tenement, unless it is so agreed.<sup>5</sup>*

*But if the tenant pays any of the premium, he has an interest.<sup>6</sup>*

403. *Where a policy for A provides that a loss shall be payable to B, the latter, if he has no lien on the policy, is not a party to it to the effect of giving him any control.<sup>7</sup>*

404. *The original assured cannot assert any interest in a policy of reinsurance.<sup>8</sup>*

<sup>1</sup> *Rogers v. Traders' Ins. Co.*, and same plaintiff *v. Howard Ins. Co.* 6 Paige, Ch. N. Y. 583.

<sup>2</sup> *Gordon v. Mass. Fire & Mar. Ins. Co.* 2 Pick. Mass. 260.

<sup>3</sup> *Mickles v. Rochester City Bank*, 11 Paige, Ch. N. Y. 118.

<sup>4</sup> *Providence County Bank v. Benson*, 24 Pick. Mass. 204.

<sup>5</sup> *Leeds v. Cheetham*, 1 Sim. Ch. 149. Stat. 19 Geo. II. c. 57, regulates the interests of landlord and tenant in this respect in London. *Ellis, Ins.* 75. For tenant's liability for rent, though the

building is burnt, see *Sadlers' Co. v. Badcock*, 2 Atk. 554; *Brown v. Quilter*, Ambl. 619; *Hare v. Groves*, 3 Anstr. 687; *Holtzapffel v. Baker*, 18 Ves. jun. 115.

<sup>6</sup> *Miltenbergher v. Beacom*, 9 Penn. 198.

<sup>7</sup> *Rogers v. Traders' Ins. Co.* and same plaintiff *v. Howard Ins. Co.* 6 Paige, Ch. N. Y. 583; *Bidwell v. Northwestern Ins. Co.* 19 N. Y. 179; *Sanford v. Mechanics' Ins. Co.* 12 Cush. Mass. 541.

<sup>8</sup> *Heckenrath v. Am. Mut. Ins. Co.* 1 Barb. Ch. N. Y. 363.

405. *A mortgagee has no interest as such in an insurance by the mortgager.*<sup>1</sup>

Whether either of the parties to a mortgage is a party to a policy effected by the other, will depend upon their agreement and the provisions of the policy.<sup>2</sup>

406. *The seamen have no interest in the owner's policy on freight on account of their wages,*<sup>3</sup> though freight is said to be the mother of wages, and insurance is indemnity for the loss of it. One reason is, that the policy is inter alios; another, that giving them such an interest would be in effect permitting their insurance of wages, which are not insurable by them.

407. *A policy in favor of A "for —— leaving a blank space in the line instead of inserting for whom, is equivalent to one for whom it may concern, if the blank is to be filled at all."*<sup>4</sup> The Supreme Court of New York decided that the blank was not intended to be filled in the policy in question.<sup>5</sup>

408. *Insuring "as agent" for a particular person, is equivalent to insuring "on his account."*

M. insured a vessel and cargo "as agent of R.," without any general description of the assured. R. had given M. instructions to obtain insurance, but the property in fact belonged to E. Chief Justice Parsons and his associates were of opinion, that, "from the import of the words of the policy, and from the necessary construction of it, no person was insured from loss but R.;" and decided that R. could recover nothing under the policy for the benefit of E.<sup>6</sup>

A policy made by a person, "as agent for H.," who was interested in a cargo owned by himself and four others not his partners, was held to apply only to H.'s interest.<sup>7</sup>

409. *If the nominal assured be described in the policy as agent generally, without saying for whom, it may be shown whose interest was intended to be insured, in the same manner as if the*

<sup>1</sup> Carter v. Rocket and New York Ins. Co. 8 Paige, Ch. N. Y. 437; Macdonald v. Black, 20 Ohio, 183. This last case relates to a mortgagee not in possession, but the doctrine is equally true in respect to one in possession.

<sup>2</sup> See Nos. 296, 379.

<sup>3</sup> Icard v. Goold, 11 Johns. N. Y. 279.

<sup>4</sup> Per Chancellor Walworth, Turner v. Burrows, in Court of Errors, 8 Wend. N. Y. 144.

<sup>5</sup> S. C. 5 Wend. N. Y. 541.

<sup>6</sup> Russell v. N. E. Marine Ins. Co. 4 Mass. 82.

<sup>7</sup> Holmes v. United Ins. Co. 2 Johns. Cas. N. Y. 329.



policy had contained the general clause "for whom it may concern." Where the assured were described in the following manner, "D., or as agent, doth insure, &c.," on vessel and cargo, there were three owners, and the policy was intended to cover the interest of two of them. Jackson, J., giving the opinion of the court, said: "This insurance was in truth made for the benefit of D. and R., and we see no difficulty in carrying that intention into effect. When the underwriter agreed to insure for D. as agent, either he was informed that R. was the principal, or he waived all information on the subject."<sup>1</sup>

In a policy by a creditor on the life of his debtor, independently of the latter, the debtor and his representatives have no interest, and payment of a loss does not satisfy the debt or go at all for the benefit of the debtor's representatives.<sup>2</sup>

In a policy by a trustee on the trust property the cestui que trust has an equitable interest.<sup>3</sup>

*A policy insuring a person interested, or authorized as owner, agent, or otherwise, is considered by Lord Campbell and his associates to be equivalent to one "for whom it may concern."*<sup>4</sup>

410. *Where the whole interest in a policy has passed by assignment of it for a valuable consideration, and notice thereof is given to the underwriter, the assignor ceases to be a party to it for any other purpose than the use of his name by the assignee in proceedings upon it.*<sup>5</sup>

Defences subsisting against the assignor at the time of the assignment are still good, but after the assignment he cannot prejudice the assignee by subsequent confessions, and is not a competent witness in favor of the underwriter; and his release given after notice to the underwriter is void, and payment to him after notice is no defence against the claim of the assignee.

The assignee of a policy in a mutual company is not the "insured" until he has given his deposit note.<sup>6</sup> And where

<sup>1</sup> Davis v. Boardman, 12 Mass. 80. See Hibbert v. Martin, 1 Campb. 538.      ney, 16 Ad. & E. 925, 6 Eng. L. & Eq. 312.

<sup>2</sup> Humphrey v. Arabin, Cas. temp. Plunk. 322, cited Bunyon, Life Ins. Part I. c. 1, § 23, and other cases ibid.      <sup>5</sup> Hackett v. Martin, 8 Me. 77, and cases there cited; and see jurisprudence respecting assignments of choses in action, passim.

<sup>3</sup> Bell v. Aheorpe, 12 Ir. Ch. 578.

<sup>4</sup> Sunderland Mar. Ins. Co. v. Kear-

<sup>6</sup> Bowditch Ins. Co. v. Winslow, 3 Gray, Mass. 415.

such assignee has not complied with the requisites for becoming a member of a mutual company, he is affected by the acts of the assignor after the assignment.<sup>1</sup>

411. *Where there are divers persons answering to the description of the assured, the policy is applied to the interest of the party for whom it was intended, and by whose order it was effected.* Where the assured was described to be J. B. C., in a policy effected by him, but at the request and on account of J. B. C. Jr., the contract was applied to the interest of the latter.<sup>2</sup>

412. In a case upon a fire policy upon goods, "as well the property of the assured, as held by them in trust, or on commission," Mr. Justice Oakley said: "*The words, 'goods held in trust or on commission,' are equivalent to the clause, 'for whom it may concern,' usually inserted in marine policies. They contain a distinct declaration that the assured were acting for the benefit of their consignors.*"<sup>3</sup>

413. *Whether, under a policy effected by an assured as agent or trustee, the principal is subrogated merely to the rights which the agent would have had as principal, and is subject to like set-off and other defences?*

It was held by Denman, C. J., and his associates of the King's Bench in England, that such defence will avail the underwriter in a suit at law on a policy effected in the name of a party declared in the policy to be "interested or duly authorized as agent," which is equivalent to "for whom it may concern,"<sup>4</sup> unless the court has, on application, previously ordered otherwise. But the American courts have decided directly to the contrary, namely, that *in a suit at law, on a policy in the name of an agent, declared to be for the benefit of the principal, the underwriter cannot set off his demands against the nominal assured.*<sup>5</sup>

413 a. Neither party to a policy, whether original or by assignment, can, without the consent of the other, exonerate himself of

<sup>1</sup> Edes v. Hamilton Ins. Co. 3 All. Mass. 362.

<sup>2</sup> Church v. Hubbard, 2 Cranch, 187.

<sup>3</sup> De Forest v. Fulton Fire Ins. Co. 1 Hall, N. Y. 84.

<sup>4</sup> Gibson v. Winter, 5 Barnw. & Ad. 96; and see also Wilkinson v. Lindo, 7 Mees. & W. Exch. 405.

<sup>5</sup> Per Story, J., in Hurlbutt v. Pacific Ins. Co. 2 Sumn. C. C. 471; Gordon v. Church, 2 Caines, N. Y. 299, in New York; per Woodbury, J., in Aldrich v. Equitable Ins. Co. 1 Woodb. & M. C. C. 272.

his liabilities to the other upon it, and cease to be a party to it, by subrogation of a third in his place.

Where a life insurance company proposing to disengage itself from its liabilities agrees with another company to assume its risks, it still remains liable.<sup>1</sup>

So a vote of a mutual fire insurance company that in cases of premium notes on a policy not being punctually paid, the risk on the policy should be suspended, was held not to affect the claims of an assured on a policy previously issued, unless it was assented to by him.<sup>2</sup>

414. *The application of the proceeds of a policy will be made in the manner most beneficial to the assured.*

A being entitled to an annuity during the lives of B and C, and the survivor of them, a policy was effected in his behalf on one of the lives, which having dropped, the question arose whether the proceeds should be applied in discharging the arrears of the annuity, which would, in effect, be so much in relief of the grantor of the annuity. Lord Chancellor Sugden decreed against such application, and in favor of its going to the annuitant directly, as an indemnity for the diminution of the value of the annuity, by the dropping of one of the lives.<sup>3</sup>

<sup>1</sup> Atkinson v. Gylby, 2 De Gex, M. & G. Ch. 670, 13 Eng. L. & Eq. 209.

<sup>3</sup> Millikin v. Kidd, 4 Drur. & Warr. Ch. Ir. 274.

<sup>2</sup> New England Mut. Fire Ins. Co. v. Butler, 34 Me. 451.

## CHAPTER V.

### DESCRIPTION OF THE SUBJECT.

SECT. 1. Description of the subject in general. — Of different kinds of interest, as owner, mortgagee, &c.

2. Cargo, goods, wares, merchandise, property.

3. Profits.

SECT. 4. Ship.

5. Freight.

6. Subject of fire policies.

7. Of fishing voyages.

8. Of reinsurance.

#### SECTION I. DESCRIPTION OF THE SUBJECT IN GENERAL. — DIFFERENT KINDS OF INTEREST, AS OWNER, MORTGAGEE, ETC.

415. IT is necessary that *the thing insured, and in some cases also the kind of interest* intended to be protected, *should be sufficiently set forth* in the policy, or that the policy should at least prescribe the way of ascertaining to what the contract is to be applied. As the contract will embrace no other subject than that described, its validity will depend upon the sufficiency of the description.<sup>1</sup>

A policy on "piece goods" cannot be applied to "hats ;"<sup>2</sup> nor one on "oil and barilla" to "soap."

Emerigon thinks a policy on "ingots of gold" may be applied to gold "coins" and "utensils," because they might be made into ingots without changing the substance.<sup>3</sup> This seems, however, to be a somewhat fanciful reason.

Some marine ordinances require that goods subject to extraordinary risks, as, for instance, contraband of war, shall be specifically described in the policy, that the underwriter may be apprised of the risk ;<sup>4</sup> and a policy on "goods" or "merchandise" or "cargo" generally, would, accordingly, not cover such property. Neither the laws of England, nor those of the United States,

<sup>1</sup> Langhorn v. Cologan, 4 Taunt. 330 ;  
Cheriot v. Barker, 2 Johns. N. Y. 346.

<sup>2</sup> Hunter v. Prinsep, Marshall, Ins.  
316.

<sup>3</sup> Tom. I. pp. 299, 300, c. 10, s. 3.

<sup>4</sup> 1 Magens, 9, s. 14 ; Wolcott v. Eagle Ins. Co. 4 Pick. Mass. 434 ; Weskett, tit. Goods.



make any special provisions on this subject, yet it has been held in both countries that certain kinds of property, as live stock, for instance, are not insurable under such general descriptions.<sup>1</sup>

A description of goods, freight, a ship, house, or other thing insured, by which it may be distinguished and identified, will generally be sufficient.

416. *If one own a half or any other proportion of a ship or of goods, he may effect insurance generally without specifying his interest, and he will recover for such interest as he has.*<sup>2</sup> And a partner may insure goods as "his" where his copartner is interested only in the profits, though the policy will cover only his interest existing at the time of the commencement of the risk.<sup>3</sup>

417. *An insurance in the name of A merely,*<sup>4</sup> or "for account" of A,<sup>5</sup> or of A "as property may appear,"<sup>6</sup> *is applicable only to his interest.*<sup>7</sup>

418. *An insurance in the name of A and B without more, is held by the English King's Bench and Common Pleas, not to be applicable to the sole absolute interest of A.*<sup>8</sup>

419. *A charterer of a ship or other party having the rightful possession and use of a thing under an agreement to pay for all losses and repairs, has an insurable interest, which may be covered by a policy in his own name generally, without specifying the kind of interest.*

The owner of one half of a schooner chartered the other half, with an agreement to pay for it in case of loss. A policy upon it generally, not specifying his interest, was held to be applicable to its whole value.<sup>9</sup>

420. *An assignee of any subject for a valuable consideration, having a lien upon it, and the possession or control and disposition*

<sup>1</sup> See *Infra*, s. 2.

<sup>2</sup> *Lawrence v. Van Horne*, 1 Caines, N. Y. 276; *Murray v. Columbian Ins. Co.* 11 Johns. N. Y. 302; *Rising v. Burnett*, Marsh. 730; *Lawrence v. Sebor*, 2 Caines, N. Y. 203; *Toppan v. Atkinson*, 2 Mass. 365; 1 Emer. 293, c. 10, s. 1.

<sup>3</sup> *Irving v. Excelsior, &c. Ins. Co.* 1 Bosw. N. Y. 507. See also *Gould v. York, &c. Ins. Co.* 47 Me. 403; *Peoria Ins. Co. v. Hall*, 12 Mich. 202.

<sup>4</sup> *Cohen v. Hannam*, 5 Taunt. 101.

<sup>5</sup> *Kemble v. Rhinelanders*, 3 Johns. Cas. N. Y. 130.

<sup>6</sup> *Graves v. Boston Mar. Ins. Co.* 2 Cranch, 419.

<sup>7</sup> See *supra*, No. 380.

<sup>8</sup> *Bell v. Ansley*, 16 East, 141; *Cohen v. Hannam*, 5 Taunt. 101.

<sup>9</sup> *Oliver v. Greene*, 3 Mass. 133. See also *Bartlett v. Walter*, 13 Mass. 267.

of it, *may insure it under a general description without specifying his interest.*<sup>1</sup>

421. *A mortgagee may insure the mortgaged subject generally, without specifying his interest to consist in a mortgage.*<sup>2</sup>

A supercargo having assigned his commissions and the proceeds of them as security for money advanced to him, the assignee effected insurance upon them, under the description of "commissions of F. out, and proceeds of said commissions homewards," not specifying the assignment. It was held that the policy protected his interest.<sup>3</sup>

422. *A trustee having the title to property, and the possession and management of it, may insure it in his own name without specifying his interest.*<sup>4</sup>

By the laws of Louisiana, the husband having the trust and management of the wife's property may so insure it.<sup>5</sup>

423. *So a consignee or other party entitled to a lien upon property, on account of advances or otherwise, may cover his own interest by insurance upon it in his own name generally, without specifying it, unless there is some provision in the policy to the contrary.*<sup>6</sup>

Policies sometimes require such interests to be specified.<sup>7</sup> It is held in Kentucky that insurance on all articles of stock in a pork-house, covers all such without regard to the ownership.<sup>8</sup>

<sup>1</sup> *Paradise v. Sun Mut. Ins. Co.* 6 La. Ann. 596.

<sup>2</sup> *Russel v. Union Ins. Co.* 1 Wash. C. C. 409; *Holbrook v. American Ins. Co.* 1 Curt. C. C. 193; *Ins. Co. v. Woodruff*, 2 Dutch. N. J. 541.

<sup>3</sup> *Wells v. Philadelphia Ins. Co.* 9 Serg. & R. Penn. 103. See also *Irving v. Richardson*, 2 Barnew. & Ad. 193, and see cases cited to No. 432. *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25, has a contrary aspect, but the better doctrine seems to be as stated in the text.

*Stetson v. Mass. Fire & Mar. Ins. Co.* 4 Mass. 330; *Bell v. Western Mar. & Fire Ins. Co.* 5 Rob. La. 423, overruling *Bell v. Western*, and same plain-

*tiff v. Firemen's Ins. Co.* 3 id. 423, 428.

<sup>5</sup> *Clarke v. Firemen's Ins. Co.* 18 La. 431; *Mutual Ins. Co. v. Deale*, 18 Md. 26.

<sup>6</sup> *Carruthers v. Sheddon*, 6 Taunt. 14; *S. C.* 1 Marsh. 416; *Wolff v. Horncastle*, 1 Bos. & P. 316; and see *supra*, c. 4, No. 380, 392. The case of *Toppan v. Atkinson*, 2 Mass. 365, is opposed to the doctrine stated in the text, but the authority of that case may well be questioned.

<sup>7</sup> As in the New York policies. *Brichta v. N. Y. La Fayette Ins. Co.* 2 Hall, N. Y. 372.

<sup>8</sup> *Ætna Ins. Co. v. Jackson*, 16 B. Monr. Ky. 242.

424. *The interest of carriers in consequence of their liability to the owners of the goods carried, may be insured under a general description of the goods, without specifying the particular interest intended to be covered.*

Insurance was made on "canal navigation boats, containing goods, at work between London, Wolverhampton, Birmingham, &c., backwards and forwards, £12,000 on goods as interest might appear." Some goods were damaged in consequence of the sinking of a boat, and the carriers were obliged to pay the damage. In a suit to recover this loss against underwriters, the description was held to be sufficient.<sup>1</sup> This is, in effect, a reinsurance, as the carriers may be considered to be insurers.

425. *A vessel being agreed to be sold, but to remain registered in the vender's name, as security for the price, the purchaser may insure it to its full value in his own name under a general description.*<sup>2</sup>

426. *An owner who has mortgaged a vessel or any other property may insure it to its full value under a general description.*<sup>3</sup> And so the mortgaging of an owner's partial interest in any property will not prevent him from insuring his interest in like manner.

427. *Whether a lender on bottomry or respondentia must describe his particular interest as such in the policy.*<sup>4</sup>

Lord Mansfield says, "he could not find even a dictum in any writer, foreign or domestic, that the respondentia creditor may insure on goods, 'as goods,' and that it was established now as the law and practice of merchants, that respondentia and bottomry must be specified in the policy."<sup>5</sup> The reason given by Kent. J., is, that "there is neither average nor salvage, and a capture does not mean a temporary taking merely, but one that occasions a total loss."<sup>6</sup> But this reason has become obsolete, as bottomry is

<sup>1</sup> *Crowly v. Cohen*, 3 Barnew. & Ad. 478. See also *Natta v. Mutual Security Ins. Co.* 2 Sandf. N. Y. 490.

<sup>2</sup> *Kenny v. Clarkson*, 1 Johns. N. Y. 385.

<sup>3</sup> *Higginson v. Dall*, 13 Mass. 96; *Williams v. Smith*, 2 Caines, N. Y. 19; *Kenny v. Clarkson*, 1 Johns. N. Y. 385; *Locke v. North American Ins. Co.* 13 Mass. 61.

<sup>4</sup> *Williams v. Smith*, 2 Caines, N. Y. 19; *Robertson v. United Ins. Co.* 2 Johns. Cas. N. Y. 250; *Jennings v. Pennsylvania Ins. Co.* 4 Binn. Penn. 251.

<sup>5</sup> *Glover v. Black*, 3 Burr. 1394; 1 W. Blackst. 396.

<sup>6</sup> *Robertson v. United Ins. Co.* 2 Johns. Cas. N. Y. 250.

more frequently now made, expressly or by implication, subject to average, and entitles the lender to salvage, and subjects him to the expense of salvage, in the same manner as an insurer, and the rate of marine interest, and of the premium in effecting insurance on his interest, is regulated accordingly.

It was formerly a usage in an East India voyage for the master to be allowed marine interest on advances for the use of the ship during the voyage, which usage was construed to give him the character of a bottomry or respondentia creditor. Lord Mansfield and Justices Ashurst and Buller held that his interest was covered under the description of "goods, specie, and effects."<sup>1</sup> If the interest in this case was that of a bottomry creditor, and the reimbursement was contingent and depended on the vessel's surviving the perils of the voyage, the decision is inconsistent with the doctrine that bottomry interest must be specified in the policy. It does not appear what reason there is for the specification of this interest in the policy any more than that of a mortgagee, or reinsurer. The assured in either case must prove his interest, and the loss by perils for which he was liable by the bottomry bond in order to recover indemnity. It is well settled that a mortgagee may insure generally,<sup>2</sup> and the better doctrine seems to be the same in respect to reinsurance.<sup>3</sup>

428. The interest of *captors, having no grant from the government, but only a well-grounded expectation of a grant of a part or the whole of the captyred property, cannot be protected by insurance without specifying the interest in the policy.* Lord Ellenborough says: "Supposing such a chance insurable, must it not be insured specifically as such chance? Can a man who has no right, legal or equitable, effect an insurance, merely because he has a chance of some collateral benefit, if the ship should arrive?"<sup>4</sup> But a general policy upon ships and cargoes was held to be valid as applied to the interest of the government in prizes.<sup>5</sup>

<sup>1</sup> Gregory v. Christie, 3 Dougl. 419.

<sup>2</sup> Supra, No. 421.

<sup>3</sup> Infra, No. 498.

<sup>4</sup> Routh v. Thompson, 11 East, 433.

<sup>5</sup> Same v. same, 13 East, 274. Where a certain proportion of prizes that shall be made is granted to captors by a standing law, there is apparently no

objection to the insurance of their share under a general description of the ship or cargo. But a question is not likely to arise on such a policy, since the specification of the interest is usually made in describing the subject.



429. *A policy in the alternative, expressed to be upon one or the other or both of two subjects,—as where the policy is on cargo or freight, both or either,—may be applied to either, if the assured proves to be interested in but one; but if he is interested in both, it must be applied to both proportionably to his interest, if no other appropriation has been made before a loss has taken place.<sup>1</sup> And a claim for the whole amount insured for loss on one subject is an election to cancel the insurance on the other.<sup>2</sup>*

430. *If the description designates the subject with sufficient certainty, or suggests the means of doing it, a mistake of the name of the ship, or of other particulars, will not defeat the contract.<sup>3</sup>*

Insurance being on “five hogshead of sugar marked D. on board of the B. from V. to P.,” the assured proved his shipment of that quantity on board of the same vessel for the same voyage, but by mistake of the broker in the reading of the order the sugars were described as marked D., instead of another mark. The order was exhibited to the agent of the underwriters at the time of making the policy, who marked it with his initials. Mr. Justice Washington ruled that the subject was adequately identified.<sup>4</sup>

Doubloons were held to be covered under the general description “cargo,” there being no evidence that they were on board of the vessel for any other purpose than to procure goods for transportation on the voyage.<sup>5</sup>

A policy being made on “the Leopard, or by whatever other name the said ship should be called, whereof was master for that voyage A. B., or whoever else should be master;” it appeared that the ship, of which A. B. was master, was the Leonard, and had never been called the Leopard. It was insisted, on behalf of the underwriter, that the general words were meant only to embrace the case where the ship is called by the name in the policy, and also by other names; but Chief Justice Lee was of a different opinion, and held the testimony of A. B. that he was

<sup>1</sup> Faris v. Newburyport Ins. Co. 3 Mass. 476.

<sup>4</sup> Ruan v. Gardner, 1 Wash. C. C. 145.

<sup>2</sup> Stillwell v. Staples, 19 N. Y. 401.

<sup>5</sup> Wolcott v. Eagle Ins. Co. 4 Pick.

<sup>3</sup> Pothier, Ins. n. 105; and Estrangin's note, 1 Emer. 159, c. 6, s. 2. Mass. 429.

master of the *Leonard*, and never had been so of the *Leopard*, to be sufficient to identify the vessel.<sup>1</sup>

Another vessel, bearing the Spanish name *Tras Hermanas*, was described in the policy, by a translation of the name, as the *Three Sisters*, and this was held to be a good description.<sup>2</sup>

A policy being made on goods on board of the ship "called the American ship *President*, or by whatever other name the same ship should be called;" the goods were on board of "the *President*;" and it was urged that the admitting of the sufficiency of this description would expose underwriters to fraud. The court did not think the objection sufficient to defeat the policy.<sup>3</sup>

## SECTION II. CARGO, GOODS, WARES, MERCHANDISE, PROPERTY.

431. The ordinances of some countries have provided, that the general description, "goods, wares, and merchandise," should not apply to *perishable commodities*, unless they were particularly named;<sup>4</sup> but there seems to be no such distinction in England or the United States.

432. Similar provisions have been made in some ordinances respecting *the precious metals*, coined or uncoined;<sup>5</sup> but they undoubtedly come within the general description, except in the case of clandestine trade;<sup>6</sup> and there seems to be no reason for this exception, since the fact that the trade is prohibited appears to involve the question of concealment, or the legality of the contract, rather than that of the sufficiency of the description.

Mr. Justice Dampier says: "Goods, wares, and merchandise will cover dollars if entered at the custom-house."<sup>7</sup> And the description, "goods and merchandises," has been held to be applicable to specie dollars, the proceeds of sales of goods covered by the policy.<sup>8</sup>

Emerigon considers the description, "ingots of gold," to be

<sup>1</sup> *Hall v. Molineux*, cited 6 East, 385. Goods; 1 Emer. 297, c. 10, s. 2; Park,

<sup>2</sup> *Clapman v. Cologan*, 3 Campb. 382. 26; Marsh. 319.

<sup>3</sup> *Le Mesurier v. Vaughan*, 6 East, 382.

<sup>7</sup> *Thomas v. Royal Exch. Ass. Co.* 1 Price Exch. 95.

<sup>4</sup> 1 Magens, 9, s. 14; *Weskett*, tit. Goods.

<sup>8</sup> *American Ins. Co. v. Griswold*, 14 Wend. N. Y. 399; and see *Coggeshall v. American Ins. Co.* 3 Wend. N. Y. 283.

<sup>5</sup> 1 Magens, 9, n.

<sup>6</sup> 1 Magens, 10, s. 15; *Weskett*, tit.

applicable to coins, and utensils of that metal.<sup>1</sup> But this appears to be a forced construction.

Mr. Justice Dampier says, the description, "goods, wares, and merchandise," will not cover "*bills of exchange*."<sup>2</sup>

433. Mr. Justice Spencer considers *a curricie* as coming *with- in the description of goods, wares, and merchandise*. He said: "The assured was not bound to specify the nature of the cargo."<sup>3</sup>

434. *Articles of clothing* for use by persons on board, and not for trade, are not covered as goods, wares, and merchandise.<sup>4</sup>

435. *Nor are rings, jewels, &c.*, which are not intended for trade, but *belonging to the persons of those on board of a vessel, covered under such general description*.<sup>5</sup>

436. Lord Ellenborough says: "*Outfit* cannot be considered as 'goods,' in any proper sense of that word, that is, as part of the cargo."<sup>6</sup>

437. *Where the policy is on cargo, goods, property, &c.*, "*by ship or ships*," for a specified voyage, from a certain port, or certain ports, or in general for a certain period, as it is applicable to goods in any ship, *the subject must be identified by the ports of shipment, the voyage, or the time of shipment*, or by any or all of these modes of distinction.<sup>7</sup>

438. *Policies* are sometimes made *on goods* "by a ship or ships," as *thereafter, to be declared*, or on goods thereafter to be declared, which leaves it to the assured afterwards to determine the subject. But the voyage is described, and generally the time mentioned within which the ships are to sail. Large amounts were formerly kept insured in this way.<sup>8</sup>

There is some hazard of fraud in these policies, as the assured may have a certain sum insured between particular ports for a certain time, and within that time ship ten times the amount, and declare the policy to be on the shipment on which a loss may

<sup>1</sup> Vol. I. c. 10, s. 3.

<sup>2</sup> *Thomas v. Royal Exch. Ass. Co.* Price, Exch. 95.

<sup>3</sup> *Duplanty v. Commercial Ins. Co.* Anth. N. Y. 114.

<sup>4</sup> *Marshall, Ins.* 727.

<sup>5</sup> *Roccus, n.* 17.

<sup>6</sup> *Hill v. Patten*, 8 East, 373. It

belongs mostly to the ship. See *infra*, s. 4.

<sup>7</sup> *Robinson v. Touray*, 3 Campb. 158;

1 Maule & S. 217; *Crowley v. Cohen*, 3 Barnew. & Ad. 478; *Atkins v. Boylston Ins. Co.* 5 Metc. Mass. 439.

<sup>8</sup> *Weskett, tit. Ship or Ships, n.* 10.

happen, when it may not be easily proved what other shipments have been made. On the other hand, this description may operate unfavorably to the assured, as he may not be able easily to prove that he had no goods at risk, in case he demands a return of premium. In this instance, as in many others, each party confides very much in the good faith of the other.

The legality of this mode of description is well established.<sup>1</sup>

Under a stipulation "sums at risk to be indorsed," the policy covers goods lost before the assured could indorse them.<sup>2</sup>

*The assured may declare the subject to which the policy is to be applied after a loss has taken place.*<sup>3</sup>

If he were required to declare before the loss, or lose the benefit of the policy, the contract would frequently be ineffectual, since it is adopted when no more particular description can be made. From the necessity of the case, therefore, he should be permitted to declare his interest after he receives news of a loss.

It would, however, be a security to the underwriters, in such a case, to insert a condition, that the assured should declare his interest immediately after receiving the necessary intelligence.<sup>4</sup>

It is held by Lord Mansfield and his associates, that, where different shipments come within the description in the policy, the assured may apply it to either. Messrs. K. and R., of L., had insured £1260 on board of the Elizabeth, from G. to L., on account of F. They had orders to insure £1300 more, and not knowing by what ship the goods were to be sent, they insured £600 in London, and £700 in Liverpool, "from G. to L., on any kind of goods as interest should appear, in ship or ships to sail before the first of August, 1793." There was nothing in the policy to except the goods by the Elizabeth; and the underwriters at Liverpool did not know that the insurance was not intended to cover those goods. The Elizabeth sailed in June and arrived safe. The H. sailed afterwards, within the time mentioned in the policy, with goods of the assured on board to the amount of £1300, and was lost. The underwriters in Liverpool refused to pay the loss, alleging that goods to the

<sup>1</sup> Kewley v. Ryan, 2 H. Blackst. 343. See also Craufurd v. Hunter, 8 Term,

<sup>2</sup> E. Carver Co. v. Manufacturers' 13 n. a.

Ins. Co. 6 Gray, Mass. 214.

<sup>4</sup> See Weskett, p. 520, tit. Ship or

<sup>3</sup> Harman v. Kingston, 3 Campb. 150. Ships.



amount insured, and within the description in the policy, had arrived in the Elizabeth, and, if damage had happened to them, the assured could have claimed a loss. But the court said: "The assured had clearly a right to apply such an insurance to whatever ship he thought proper within the terms of it."<sup>1</sup>

In this case the assured had, by the previous insurance of the shipment on the Elizabeth, so far manifested his election as to the application of the subsequent policies to other shipments, otherwise than merely by his declaration on the subsequent policies.

In a similar case before the same court, of two shipments from Bengal, and two policies effected in London, the assured had previously to the loss declared on oath before a magistrate in Bengal, whereby his declaration had publicity, to which of the shipments he intended that one of the policies should apply. This declaration repeated to the underwriters was held to fix the application of the policy to the shipment on which a loss occurred.<sup>2</sup>

439. Though it is not necessary to the validity of a policy on goods or other subjects "thereafter to be declared," that the declaration should be made previously to the loss, still, *if divers shipments or subjects belonging to the assured answering to the description, have been put at risk, and no declaration or act of the assured, by effecting other insurance or otherwise, has determined the application of a policy to particular subjects prior to intelligence of a loss, the policy must be applied to all the subjects comprehended in the description.*<sup>3</sup>

It has been held in Massachusetts on an equivalent description, namely, on "the cargo or freight of the ship America, both or either," that, after the event was known, the policy must be applied to both in the proportion of the interest of the assured in the two subjects.<sup>4</sup>

In case of an open policy by a St. Louis company, on shipments by sailing vessels or steamboats for six months on the

<sup>1</sup> Kewley v. Ryan, 2 H. Blackst. 343. Crowley v. Cohen, 3 Barnew. & Ad.

<sup>2</sup> Henchman v. Offley, 3 Dougl. 135. 478.

See also 8 Term, 13, n.; 2 H. Blackst. 343.

<sup>4</sup> Faris v. Newburyport Ins. Co. 3 Mass. 476. See Stillwell v. Staples, 19

<sup>3</sup> See 1 Emerigon, 174, c. 6, s. 5; N. Y. 401.

western waters or from the Atlantic ports by way of New Orleans, "indorsements to be evidence of property at the risk of the company," where the assured received advice of a shipment and loss at the same time, Messrs. Tompkins, Napton, and Scott decided that the shipment could not be indorsed.<sup>1</sup> A decision of Lord Kenyon and his associates<sup>2</sup> is referred to as authority for holding that the indorsement of the shipment before advice of the loss, was indispensable. A more satisfactory ground seems, however, to be that the underwriters were not liable for the risk until the assured was liable for the premium, and he was not so until the indorsement of the shipment was made; in which respect the case is distinguishable from those above cited of the subject being declared after the loss, where the description was applicable to all the shipments made on account of the assured on the voyages specified within the time specified.<sup>3</sup>

440. *The assured may revoke a declaration made by mistake, and declare anew.*<sup>4</sup>

It must, however, in such case doubtless appear that he had no goods as first declared.

441. *A policy on goods and "proceeds," or "returns," applies to return goods shipped on the credit of the outward cargo, left at a foreign port to be sold.*<sup>5</sup>

442. *A policy upon certain goods for an outward passage and the proceeds thereof home, is not applicable to the same goods brought back, at least unless a usage to that effect is proved.*

It was so held respecting a shipment consisting mostly of artificial flowers, silk goods, and muslins, from New York to India. It does not appear from the case why the same goods were returned. In the Superior Court,<sup>6</sup> one reason at first given

<sup>1</sup> Edwards v. St. Louis Perpetual Ins. Co. 7 Mo. 382.

<sup>2</sup> Worseley v. Wood, 6 Term, 710, that under a provision of a fire policy requiring a certain certificate as preliminary proof of loss by fire, (see infra No. 885,) its non-production could not be excused though it was not owing to any fault of the assured, reversing the judgment of Eyre, C. J., and his associates in Wood v. Worseley, 2 H. Blackst. 574.

<sup>3</sup> See Dowville v. Sun. M. Ins. Co. 12 La. Ann. 259.

<sup>4</sup> Robinson v. Touray, 3 Campb. 158; S. C. 1 Maule & S. 217.

<sup>5</sup> Haven v. Gray, 12 Mass. 71; Whitney v. Am. Ins. Co. 3. Cow. N. Y. 210; S. C. Am. Ins. Co. v. Whitney, 5 id. 712.

<sup>6</sup> Dow v. Hope Ins. Co. 1 Hall, N. Y. 170.

for the decision why the risk did not continue homeward was, that the goods had not been examined at the foreign port, and they might not have been in a proper condition for the homeward passage. But in the subsequent reports it is stated that they were in a sound state. In the Supreme Court and the Court of Errors, such application of the term "proceeds" was rejected, as being too obviously inconsistent with the policy. In the latter court, however, the case was remanded to give the assured an opportunity to prove that, by usage, the word "proceeds" was applicable to the same goods homeward.<sup>1</sup>

443. *Insurance on goods on board of a vessel for a certain period, or a certain voyage, admits of a change of the goods, and applies to other goods the proceeds of those shipped, where the policy, by the description of the risk, the character and length of the voyage, or the length of the period, indicates that they are to be changed.*<sup>2</sup>

Thus a policy dated in July, on goods on board of a vessel then on a trading voyage on the coast of Africa, "beginning the adventure from loading, and shall continue until the said goods shall be landed on the 10th of January," was held to apply to goods being the proceeds of those on board at the commencement of the risk.<sup>3</sup> But liberty to exchange, barter, &c., does not cover cargo landed, nor proceeds before they are loaded.<sup>4</sup>

444. *A policy upon the lading of a certain vessel employed in a certain navigation for a specified period, will be applied to all the lading of all the vessels within such period.*

In a case before the K. B. in England, the sum of £12,000 was insured for twelve calendar months, on goods on thirty boats at work between London, Wolverhampton, Birmingham, &c., backwards and forwards, and in rotation, beginning the adventure on the goods from the lading thereof on board, and continuing it until the same should be discharged, the claim on the policy warranted not to exceed 100 per cent. ; £3000 only to be covered in any one boat, on any one trip; the question was, whether the policy applied only to the first amount of £12,000 carried, or

<sup>1</sup> Dow v. Whetten, 8 Wend. N. Y. 160.

<sup>3</sup> Coggeshall v. Am. Ins. Co. 3 Wend. N. Y. 283.

<sup>2</sup> See Valin, Vol. II. p. 78, tit. Insurance, a. 27.

<sup>4</sup> Harrison v. Ellis, 7 Ell. & B. 465.

was a continuing insurance of that amount on the goods successively carried in the boats, during the year. The latter was held to be the true construction.<sup>1</sup>

445. The description of *goods shipped "between" two dates, excludes the days named.*<sup>2</sup>

446. An insurance on "*all lawful goods*" has been held to apply to *contraband goods* as well as other.

Mr. Justice Kent said: "I am of opinion that contraband goods are lawful goods; and that whatever is not prohibited to be exported by the law of the country is lawful. The law of nations does not declare the contraband trade to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent powers."<sup>3</sup>

447. Insurance is sometimes made *on goods "from the time of loading them on board,"* specifying at the same time at what port the risk is to commence.

If the goods are not laden on board at the port where, according to the policy, the risk is to commence, there may arise a question whether the policy attaches.

It has been decided in a number of cases, that the policy did not attach, and in those decisions three different grounds are assumed; one, that it is a condition, in the nature of a warranty, that the goods should be loaded on board at the place named; another, that the loading of the goods on board at such place is the only event from which to date the commencement of the risk, and this not having happened, it does not commence; and a third, that the goods do not answer to the description in the policy. The grounds of warranty and the want of commencement of the risk, have been the most distinctly alleged in support of these decisions.

It was held in New York, under a policy "upon all goods laden on board the R., beginning the adventure from the loading thereof at Cagliari," that "the hoisting the cargo out of the hold

<sup>1</sup> *Crowley v. Cohen*, 3 Barnew. & Ad. 478; *Henshaw v. Mutual Ins. Co.* 2 Blatchf. C. C. 99.

<sup>2</sup> *Atkins v. Boylston Ins. Co.* 5 Metc. Mass. 439.

<sup>3</sup> *Seton v. Low*, 1 Johns. Cas. N. Y. 1. See also *Skidmore v. Desdoity*, 2 Johns. Cas. N. Y. 77; *Juhel v. Rhineland*, 2 Johns. Cas. N. Y. 120 and 487.



and restoring it at Cagliari did not amount to loading it on board at that place.”<sup>1</sup>

A ship and cargo were insured “at and from the coast of Africa to her port of discharge in the United Kingdom, beginning the adventure upon the goods from the loading thereof aboard the said ship twenty-four hours after her arrival on the said coast;” the cargo being valued. The policy was held not to attach to any of the outward cargo remaining on board after the expiration of the twenty-four hours.<sup>2</sup>

A policy was underwritten for a voyage “at and from Singapore, Penang, Malacca, and Batavia, to a port of discharge in Europe, with leave to touch, stay, and trade at all or any ports or places whatsoever and wheresoever in the East Indies, Persia, or elsewhere, beginning the adventure on the said goods from the loading thereof on board the ship as above; with liberty to sail to, and touch, and stay at, any ports or places whatsoever and wheresoever, in any direction and for any purpose, necessary or otherwise, particularly at Singapore, Penang, Malacca, Batavia, &c.” The ship sailed from Batavia to Sourabaya, about four hundred miles to the eastward of Batavia, and not in the direction of any of the other ports named, or in the course to Europe, and there procured a part of a cargo, and then returned to Batavia to take in the rest of her cargo. It was held that the policy attached to the cargo taken on board at Sourabaya.<sup>3</sup>

Insurance was made at and from A. to St. T., and two other ports in the West Indies, and back to her port of discharge in the United States, upon “all kinds of lawful goods, laden or to be laden on board the ship C., beginning the adventure from the loading at A., and continuing the same until the goods shall be safely landed at St. T. &c., and the United States; the goods to be valued as interest may appear.” Mr. Justice Story, giving the opinion of the court on this description, said: “It is plainly an insurance upon all lawful goods, not only upon the outward voyage to the West Indies, but for the homeward voyage. The

<sup>1</sup> *Murray v. Columbian Ins. Co.* 11 Johns. N. Y. 302. But see the cases on this subject under Warranty and Risks.

<sup>2</sup> *Rickman v. Carstairs*, 5 Barnew. & Ad. 651; S. C. 2 Nev. & M. 502.

<sup>3</sup> *Hunter v. Leathly*, 10 Barnew. & C. 858, affirmed on error, 7 Bingh. 517. See also *Grant v. Paxton*, 1 Taunt.

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clause may be rationally expounded, as intended only to point out the time of the commencement and termination of the risk on the goods, successively constituting the cargo.”<sup>1</sup>

An insurance being “at and from Havre and any port or ports of France south of that place, to New Orleans,” on goods “to be shipped during six months from the 1st of August, the ship left her moorings at Bourdeaux on the 6th of August, and put to sea on the 12th from Paulier, about eleven leagues below Bourdeaux, and was wrecked off the American coast and her cargo totally lost. Part of the cargo had been put on board at Bourdeaux before the 1st of August, which the underwriters contended was not covered by the policy. But the Supreme Court of Louisiana held that the provision related to the time of the vessel’s sailing from the ports specified, not to the time of the goods being put on board, and accordingly that the policy covered goods laden on board before the first of August.<sup>2</sup> That is, the term “shipped” was applicable to the vessel sailing with the goods on board.

448. *Insurance on goods laden on board of a vessel for a certain voyage applies to the pending or first passage or trip.*

So held under a policy upon a certain number of hogsheads of sugar, to be laden on board of a steamboat on a trip from New Orleans to Louisville.<sup>3</sup>

449. On specified goods “from a certain port,” covers goods put on board at an outport in the vicinity of that named, where it is usual so to take on board articles of like description.

So held in respect of a shipment insured from New Orleans, and put on board on the opposite side of the river.<sup>4</sup>

450. *The vessel on board of which goods are insured, must answer to the description in the policy. If there is a vessel in the specified trade exactly answering to the description, the assured is precluded from applying the policy to another one in the same trade answering to it only in some respects where the underwriters can be supposed to have understood the former to have been intended.*

Insurance was made on goods “on board the brig Abeona.”

<sup>1</sup> *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383.

<sup>2</sup> *Sorbe v. Merchants’ In . Co.* 6 La. 185.

<sup>3</sup> *Courtney v. Miss. Fire & Mar. Ins. Co.* 12 La. 233.

<sup>4</sup> *M’Cargo v. Merchants’ Ins. Co.* 10. Rob. La. 334.

There were two vessels of that name in the trade specified in the policy ; one a brig, the other an hermaphrodite brig, schooner, top-sail schooner, half-brig or brigantine. The policy was held, in New York, to apply only to the former.<sup>1</sup>

451. *The subject may be identified by the fact of its being "consigned" to the assured.*

Commission merchants of New Orleans for receiving consignments of cotton coming down the Mississippi, keep on foot a general insurance "for whom it may concern, on cotton consigned to them," against loss by perils of the river ; giving notice from time to time of the consignments.

A quantity of cotton belonging to B was consigned to a commission merchant having such a general insurance, on the supposition of his being the agent of B, and the consignor, on learning that he had been under a mistake, ordered the consignee to deliver the cotton over to the agent of B. The consignee received this order, and the bill of lading, and intelligence of the loss of the cotton, at the same time. The Supreme Court of Louisiana decided that the general policy of the consignee attached to the shipment, and that the underwriters were liable to the owner of the cotton for the loss.<sup>2</sup>

452. The description of the subject as being "cargo" is very similar in construction to the description "goods."

*Provender taken on board for mules was held not to be covered under the description of "cargo."*<sup>3</sup>

453. A policy on "cargo" *has been held* in Massachusetts *not to apply to mules and horses*, whether on deck or under deck, the underwriters having no notice that such was the cargo. They are, says Mr. Justice Putnam, giving the opinion of the court, "subjects of particular insurance, and not covered under the general word cargo, or goods."<sup>4</sup> A similar decision has been given in Maryland.<sup>5</sup>

454. *A policy being made at Boston on the cargo of a ship*

<sup>1</sup> Sea Ins. Co. v. Fowler, 21 Wend. N. Y. 600.

<sup>2</sup> Ballard v. Merchants' Ins. Co. 9 La. 258. See also New York Ins. Co. v. Roberts, 4 Du. N. Y. 141 ; Shearer v. Louisiana Ins. Co. 14 La. Ann. 797.

<sup>3</sup> Wolcott v. Eagle Ins. Co. 4 Pick. Mass. 429.

<sup>4</sup> Ibid.

<sup>5</sup> Allegre's Administrators v. Maryland Ins. Co. 2 Gill & J. Md. 136. See also Weskett, tit. Goods.

"now on a whaling voyage" in the Pacific Ocean, lost or not lost, to continue during her stay, and until her return to Nantucket, it was held to attach to the proceeds of the voyage; that is, the oil taken.<sup>1</sup>

455. The term "*property*" is more comprehensive than the other general terms usually adopted in the description of the subjects of marine transportation.

Insurance effected by the master for himself on "*property*" on board of a coasting vessel for a certain period, during which, according to the ordinary course of such trade, it must be changed from time to time, by sales and purchases, and incidentally, and to a greater or less extent, and for longer or shorter periods, assume the form of the usual circulating medium, will cover moneys deposited in a suitable place on board.

It was so held relative to bank-notes on board of a vessel insured in the trade between Hingham, Mass., and Hallowell, Maine, the loss being by fire, while the vessel was at sea.<sup>2</sup>

456. Lumber and other articles were shipped for Porto Rico, on an agreement that the shipowners should be entitled to three fifths of the lumber, instead of freight, the freight of the other articles being agreed for as usual. A policy was effected on "*property on board*," intended to cover the amount to be received as freight. Parker, C. J.: "We think, that, on landing the lumber, the assured became entitled to a portion of it, under the contract; they had an interest in the cargo itself. They had property in three fifths, as much as the owners of the cargo had in the residue. The policy was to protect them from the contingency which would defeat it." The policy was considered, accordingly, to be applicable to the interest in the lumber, but not to the other freight.<sup>3</sup>

457. Under a policy on "furs," the invoice was headed, "invoice of furs;" but in the body of the invoice they were described as bear and raccoon skins, opossum, deer, fine fisher, cross-fox, martin, white raccoon, wild-cat, wolf, wolverine, panther, and cub skins, to the amount of \$24,000 in the whole. It was given in

<sup>1</sup> Paddock v. Franklin Ins. Co. 11 Pick. Mass. 227.

<sup>3</sup> Wiggin v. Merchants' Ins. Co. 7 Pick. Mass. 271. See also, to the same

<sup>2</sup> Whiton v. Old Colony Ins. Co. 2 Metc. Mass. 1. effect, Holbrook v. Brown, 2 Mass. 280.



evidence, that skins valuable chiefly on account of the fur are, in the language of trade, called *furs*, and that *skins* is a term mostly appropriated to those which are valuable chiefly for the skin; but there was some discrepancy in the testimony, as to the extent of the application of the terms; and, the testimony being submitted to the jury, they found a verdict for the whole sum insured; and the court refused a new trial. The case, however, turned mostly on the question whether the cargo came under the memorandum.<sup>1</sup>

458. The description on "oil, bone, and other takings," on a "whaling voyage" in the Pacific, covers sea-elephant oil, it being a frequent practice to take sea-elephants on such voyages.<sup>2</sup>

459. The description, "*bills of exchange*," has been much discussed in the English Court of Common Pleas.

The master of an India ship drew bills of exchange on a Calcutta merchant, payable in a certain number of days after the arrival of his vessel, in favor of a party who had advanced money for the purchase of goods, the proceeds of which were intended to be applied by the consignee and drawee of the bills in Calcutta to the payment of the bills. This species of loan had been in use some eleven or twelve years in London, instead of loans on *respondentia*, it being understood that the payment of the bills was to depend on the arrival of the ship. The lender made insurance of his interest under the description "*bills of exchange*," specifying them. Best, C. J., and his associates, decided against the assured's claim for the loss of the ship and goods with one set of the bills on board, on the ground that such a contract for the payment of money on a contingency was not a bill of exchange, and accordingly, if the plaintiff had any insurable interest, it was not properly described.<sup>3</sup> This construction was certainly very strict upon the assured.

460. The claims and liabilities of the parties to a policy relative to goods carried on deck come under consideration in respect to the description of the subject, the enhancement of the risk, and contribution for jettison; and these different phases of the subject, though the questions are not identical, are still very much connected with each other. The inquiry is not free from

<sup>1</sup> *Astor v. United Ins. Co.* 7 Cow. N. Y. 202.

<sup>2</sup> *Child v. Sun Mutual Ins. Co.* 3 Sandf. N. Y. 26.

<sup>3</sup> *Palmer v. Pratt*, 2 Bingh. 185.

difficulty in either respect, and the jurisprudence on the subject is involved in obscurity and discrepancies.

*A general description does not, except under special circumstances, cover articles carried upon deck. The articles so stowed are thereby put out of the protection of the policy, unless their being carried in this way is provided for in the policy, or indicated by the description of the article itself in the policy, or justified by the usage of the specified trade.*

Where the article specified in the policy is uniformly so carried, or obviously *must* from its character be so, for its own safety, or that of the ship, cargo, and crew, the policy will attach to it, so carried, by the merely naming of it and describing the voyage.<sup>1</sup>

The insurance on "*outfits and catchings,*" on a whaling voyage, covers "*blubber,*" or whale's flesh cut from the whale, and remaining on deck to be "*tried,*" according to the usage in that species of fishery.<sup>2</sup> There is a uniform usage to carry on deck, and also an indication, by the description of the subject and the voyage, that the part of the subject in the form of "*blubber*" is to be on deck.

So, in the illustration given by Mr. Justice Putnam,<sup>3</sup> of an insurance specifically upon an elephant, the character of the specified subject is a sufficient indication of the manner in which it is to be transported.

Upon the same principle, in a case before Lord Denman and his associates, on a policy specified to be on "*pigs,*" on a passage from Waterford to London, alleged to be carried on deck, in conformity with a usage so to carry them, the policy was held to attach.<sup>4</sup>

Thus far the proper rule is obvious, and the cases agree. Beyond this, we come to a difficult question, on which the jurisprudence is wavering and inconsistent; namely,

*Whether the policy attaches to an article on deck that is merely named, without any express intimation in the policy that it is to be so carried, where articles of the same kind are not*

<sup>1</sup> Taunton Copper Co. v. Merchants' Ins. Co. 22 Pick. Mass. 108; Smith v. Miss. F. & M. Ins. Co. 11 La. 142.

<sup>2</sup> Rogers v. Mechanics' Ins. Co. 1 Stor. C. C. 603.

<sup>3</sup> 22 Pick. 108.

<sup>4</sup> Milward v. Hibbert, 3 Q. B. 120.

necessarily or uniformly so stowed, but *sometimes go on deck, and sometimes under*, according to the quantity and kind of cargo?

It has been held in Massachusetts and Louisiana, that such an article will not be so covered, unless a usage for underwriters to pay for it when so carried is proved, as well as a usage so to carry it.<sup>1</sup> This is, however, quite a questionable form of presenting the rule.

In a case before the Queen's Bench in England,<sup>2</sup> it was decided, on demurrer to a replication of a usage to carry pigs on deck, that the policy upon them attached, and that the underwriters were liable to reimburse to the ship-owner a contribution in general average, on account of a jettison of the pigs. There was no allegation of a usage for underwriters to pay for such an article, so carried in the trade insured upon.

But that was probably a case of uniform usage, the same article being always stowed in that manner. This would leave the question open as far as that case is concerned, whether the fact that an article is sometimes carried on deck, and sometimes under, constitutes a usage to carry on deck, of which the insurers are bound to take notice, as being in effect a license to transport it in that manner, implied by the mere naming of the article, or by the description of the voyage.

An often-cited ruling of Lord Ellenborough<sup>3</sup> amounts to the doctrine, that in such a case the policy attaches, and the underwriters are liable, whether the article is stowed in one or the other way. But the greater weight of authority favors the doctrine, that in such case the underwriters are not liable.<sup>4</sup>

This question arises in connection with that of contribution, for the jettison of the deck-load, and the authorities do not agree, some being in favor of contribution, others against it.<sup>5</sup>

<sup>1</sup> Taunton Copper Co. v. Merchants' Backhouse v. Ripley, 1 Park, Ins. 14; Ins. Co. 22 Pick. Mass. 108; Smith v. Ross v. Thwaite, id. The form of Miss. F. & M. Ins. Co. 11 La. 142. policy of the Lexington (Ky.) Ins. Co. expressly excludes articles carried on

<sup>2</sup> Milward v. Hibbert, 3 Q. B. 120.

<sup>3</sup> Da Costa v. Edmunds, 4 Campb. 142.

<sup>4</sup> Taunton Copper Co. v. Merchants' Ins. Co. 22 Pick. Mass. 108; Wolcott v. Eagle Ins. Co. 4 Pick. Mass. 429;

deck. And see Gould v. Oliver, 2 Mann. & G. 208; and Rogers v. Mechanics' Ins. Co. 1 Stor. C. C. 603, cited supra, No. 137.

<sup>5</sup> See chapter on General Average.

If there is a contribution for the jettison under the general usage of the trade, without any special stipulation, then the insurers are liable, as matter of necessary inference, to reimburse it; for all marine policies, insuring against the usual perils, either expressly or by implication, insure against general average.

Where the jettison of the article is not the subject of a contribution by the ship, cargo, and freight, the question arises whether the insurers are liable for the loss of the article by jettison under the risk of "perils of the sea," and if the usage of the trade authorizes the carrying it indifferently either above or below deck, there is, on the part of the policy, precisely the same ground for indemnity by the insurers as in any other case whatsoever. The burden of proving an exception is on the insurers. The common form of the policy says nothing about the manner of stowing. By construction, it is a condition that the article insured shall be properly stowed. The proper stowage of almost all articles, in almost all voyages, is in the hold. Accordingly, the general rule is, that goods must be stowed there. But where, from the nature of the article, it can properly be carried only on deck, it is as much a condition that it should be so carried, as in other cases it is a condition to stow in the hold.

It has been objected, that, in respect of many articles, the risk is enhanced by their being on deck. This may be so. The question then is as to notice, and is the same between all the parties respectively, that is, the shipowner on one side, and the shipper of the jettisoned article on the other, or the other shippers and the shipowner on one side, and the shipper of the jettisoned article on the other, or between any of these and their underwriters; namely, Had the party, whose property has been jettisoned from the deck, notice that it would be so carried? Had another shipper, who is called upon for contribution, notice that the jettisoned article would be so carried? And had the underwriter on the jettisoned article, or on any other interest from which contribution is demanded, like notice?

First, in respect to the shipper of the jettisoned article, if it is one that requires to be carried on deck, there can be no pretence for any claim by the shipper against the carrier for any loss or damage arising from its being stowed there. If it is of a kind that is carried above or under deck indifferently, or part in each



way, as in case of a cargo of lumber from Quebec, and this is frequent and ordinary in respect of such an article on the particular voyage, and is presumed to be well known to everybody conversant in the trade, there surely can be no ground for imposing an extraordinary liability upon the shipowner for damage or loss on an article so stowed. As between these parties, the article must be considered to be properly carried.

In relation to the liability of the other shippers to make contribution for the jettison of the article under these circumstances, the case is precisely similar. If the article is properly stowed, and there is good ground for presumption that such an article would be so carried, it does not appear why it should not be contributed for as well as any article differently stowed.

In reference to the underwriters, the same rule ought to hold, in a case where contribution is made. But further, if they know of what kind the article is, and are presumed to have notice from the usage of the trade that it may be carried on deck, it does not appear why the underwriters should not be liable for such a loss by the perils of the seas, as well as for that of one stowed in the hold.

Upon these principles, the confusion and discrepancies of this part of the commercial law may be remedied; and I do not see any other way of escaping from the perplexity in which the jurisprudence concerning it is involved. The doubt would thus be thrown upon the facts of each particular case, instead of hanging over the doctrines of the law as at present; and this difference is of incalculable importance, for an error in a verdict ends with the particular case, whereas the evils of inconsistency, error, and obscurity in doctrine necessarily spread over the whole current of the branch of jurisprudence to which they relate.

I accordingly conclude, that,

*If by the description of the voyage, or the character of the article specified in the policy, the underwriter may be presumed to be apprised of a usage to carry it on deck, the policy will attach to it so carried.*<sup>1</sup>

<sup>1</sup> See *Merchants' Ins. Co. v. Shillito*, 15 Ohio St. 559; *Toledo Ins. Co. v. Speares*, 16 Ind. 52; also Nos. 460, 1282. Some of the policies on inland transportation contain a provision on this subject, but in most instances, if not in all,

## SECTION III. PROFITS.

461. A policy on expected *profits* is usually made on the subject by that term.<sup>1</sup>

462. *An insurance on ship or goods specifically*, without any indication that another subject is intended, *cannot be applied to expected profits.*<sup>2</sup> Nor will a policy on an inn,<sup>3</sup> or a theatre,<sup>4</sup> cover the profits expected to accrue from conducting the specified establishment.

It was decided in New York, that an insurance "at and from C. to N., in and with the schooner R., on profits" on all goods laden and to be laden, &c., which goods are valued at \$2500,—the words quoted being written,—was a policy on profits, though the valuation seems to refer more directly to the goods.<sup>5</sup> The written part of the policy controls the printed, and here the insurance by the written part was expressly upon profits.

A policy "upon goods, and also upon the body of the ship E., the said ship, goods, and merchandises, for so much as concerns the assured, by agreement between the assured and assurers, are, and shall be, on profits,"—the words "on profits" being written, and the rest of the description printed,—was decided to be a policy on profits. And Lord Ellenborough said, "Are profits any thing more than an excrescence upon the value of the goods beyond the prime cost?"<sup>6</sup>

It is said in one case to have been the practice in Philadelphia to insure profits under the denomination of "goods."<sup>7</sup>

A right to a certain per cent., proportion, or share of a cargo as commissions on profits, or instead of freight, is covered under the description of "property."<sup>8</sup>

to exclude the risk on deck. The provision more needed is one to admit and regulate the liability, instead of attempting to avert it, since it is desirable to make the rules of indemnity as broad as they safely can be.

<sup>1</sup> As to such a policy being void by Stat. 19 Geo. II. c. 37, § 1, see *Smith v. Reynolds*, 1 Hurlst. & N. Exch. 221; 38 Eng. L. & Eq. 292.

<sup>2</sup> *Lucena v. Craufurd*, 5 Bos. & P. 269, 315.

<sup>3</sup> *Wright v. Pole*, 1 Ad. & E. 621.

<sup>4</sup> *Niblo v. North American Fire Ins. Co.* 1 Sandf. N. Y. 551.

<sup>5</sup> *Mumford v. Hallett*, 1 Johns. N. Y. 433.

<sup>6</sup> *Eyre v. Glover*, 16 East, 218.

<sup>7</sup> *Prichet v. Ins. Co. of North America*, 3 Yeates, Penn. 461.

<sup>8</sup> *Holbrook v. Brown*, 2 Mass. 280;

## SECTION IV. THE SHIP.

463. In some American ports <sup>1</sup> the same printed form of policy is used for ship, cargo, and freight, by filling the blanks with the specification of the subject to be insured. The ship, freight, cargo, and profits may, accordingly, be insured for the same party in one policy. But if only the ship or cargo is insured, many of the provisions in the printed forms will be wholly inapplicable.

In most American ports, two distinct printed forms are used, one for the vessel, the other for the cargo; and, by some companies, a third form is used for freight. Other distinct forms are again in use for steamboats, canal-boats, flat-boats, &c.

In a distinct common form for the vessel, before the blank space for its name and description, are inserted the words "upon the body, tackle, apparel, and furniture, of" the ship, brig, &c., "called," &c., or other equivalent specifications. This is a part of the time-honored enumeration in the English policies, namely, "upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of the good ship or vessel called," &c. *Most American marine policies, however, describe the subject as "the ship, brig, schooner, &c., A," without more; and therefore cover what is signified by such a description in such a contract.*

It is well settled that a policy for a commercial voyage on a vessel generally, without any further specification, covers, not only the body, but also the rigging, sails, tackle, boat, armament, and provisions, and all the appurtenances necessary, suitable, or usual, and that may be presumed to belong to a vessel of such description, for the purposes of navigation on a voyage such as that described. The rule is different as to fishing voyages.<sup>2</sup>

Mr. Justice Buller is reported to have said, "The provisions are no part of the thing insured," meaning the ship;<sup>3</sup> but he was speaking in reference to the underwriters being liable to pay for those consumed during detention, which they may not be, though the provisions constitute a part of the subject under the policy. The consumption of provisions is usually only a part of the

Wiggin v. Mercantile Ins. Co. 7 Pick.

Mass. 271; supra, No. 455.

<sup>1</sup> Boston.

<sup>2</sup> See infra, sect. 6.

<sup>3</sup> 1 Term, 127; Eden v. Pole, id. 132, n.

ordinary expense of navigation, and is no more a subject of indemnity than ordinary wear and tear and decay of the vessel.

Lord Mansfield says: "In a policy on a ship, the insurance is on the body of the ship, tackle, and furniture:"<sup>1</sup>

Lord Ellenborough: "The hull and outfits are both protected by insurance on the ship:"<sup>2</sup>

Weskett: "The outfits comprehend sails, cordage, provisions, armament, and ammunition."<sup>3</sup>

In Lord Kenyon's time, the assured, in a policy on the ship and furniture, recovered for a loss of the tackle and provisions.<sup>4</sup>

Lord Ellenborough says: "As far as the outfit consists of provisions put on board for the use of the crew, they are covered by an insurance on the ship, being in fact part of the necessary furniture, stores, and equipment of every ship proceeding on a voyage."<sup>5</sup>

Emerigon says, that the rigging and boat are covered by a policy upon the ship.<sup>6</sup>

In the United States the construction is the same.

464. It was held by Lord Lyndhurst, and the other judges of the English Court of Exchequer, that, under a policy upon "the ship, tackle, apparel, ordnance, munition, boat, and other furniture," the *boat slung upon the quarter* is covered, that being the usual manner of carrying the boat on the voyage insured, and that evidence of a usage that the boat was not covered by the policy was inadmissible, as being inconsistent with the policy.<sup>7</sup>

465. The question has been made in Massachusetts, *whether the description, "the ship," covers the boat slung at the stern davits.*

The real question here is, not whether the boat is covered under this description as part of the outfit, for of this there is no doubt, but whether the carrying of the boat at the stern is a proper way of carrying it; or, in other words, whether the carrying it in this way is an enhancement of the risk, like carrying goods on deck, and so in the nature of a deviation, which suspends

<sup>1</sup> Robertson v. Ewer, 1 Term, 127.

<sup>5</sup> Hill v. Patten, 8 East, 373.

<sup>2</sup> Forbes v. Aspinwall, 13 East, 323.

<sup>6</sup> Vol. 1, p. 179, c. 4, s. 7.

<sup>3</sup> Title, Outfit, p. 382. See also p. 433, tit. Provisions.

<sup>7</sup> Blackett v. Royal Exch. Ass. Co.

<sup>2</sup> Crompt. & J. Exch. 244.

<sup>4</sup> Brough v. Whitmore, 4 Term, 206.



the risk on the boat as it does on goods, while carried on deck. Whether this is the result in respect to the boat depends on this being a proper or usual way of carrying it. The usage, and with it the rule, may be different in respect of different species of vessels, or different voyages. In the Massachusetts case referred to, the witnesses differed as to the usage, and as to its being safe and proper to carry the boat at the stern; but as it did not appear from the testimony that it was unusual, or an extraordinary enhancement of the risk, it was ruled that the boat so carried was covered by the policy.<sup>1</sup>

That is to say, *if the carrying of the boat so slung is usual under like circumstances, or if it does not enhance the risk of the boat, and that unnecessarily, it is still covered under a policy on the "ship,"* as one of its appurtenances. If the exigencies of the service require the boat to be so carried, there is no need of resort to usage.

466. *A policy on the ship covers not only the ship as it may be at the time of the commencement of the risk, but also as it may be altered by repairs.*<sup>2</sup>

The question, however, as to the alteration of the subject so as to change the risk, will be open to consideration in this case, as well as under a policy on a house.

467. *Whether the interest of the mortgagee of a ship is covered by insurance of the ship declared to be "on bottomry?"*

Insurance on the interest of a mortgagee of a ship, declared in the policy to be "on bottomry," was held by the English Common Pleas not to cover the interest of the assured, though the insurance was also expressed in the policy to be on the body and tackle of the ship, which, if this part of the description was considered to be of force, and not cancelled by the expression "on bottomry," seems to have been sufficient, since a mortgagee may insure the subject generally, without specifying his interest.<sup>3</sup>

<sup>1</sup> Hall v. Ocean Ins. Co. 21 Pick. Mass. 472.

<sup>2</sup> 12 East, 565; 4 Taunt. 367.

<sup>3</sup> Simonds v. Hodgson, 6 Bingh. 114.

Mr. Justice Parke puts the decision upon the authority of Power v. Whitmore, 4 Maule & S. 141, in opposition to that in Walpole v. Ewer, Marshall,

Ins. 3d ed. London, p. 367, decided, as Mr. Justice Parke says, when Lord Kenyon "was new in his office." But the point in Walpole v. Ewers seems to be different from that in Simonds v. Hodgson; nor does it very distinctly appear that Power v. Whitmore presented the same point.

The same case came before the King's Bench on error,<sup>1</sup> where the judgment of the Common Pleas was reversed, and the description of the subject in the policy held to be good. But this judgment was given upon a different construction of the instrument on which the insurable interest depended. Lord Tenterden says, that the words of the instrument were : " I bind myself, my ship and tackle," &c., to pay the sum borrowed, with twelve per cent. bottomry premium, in eight days after my arrival at the port of London. We are of opinion that the words ' my arrival ' must be understood to mean ' my ship's ' arrival." Accordingly, the court thought that the instrument was strictly a bottomry bond.

Supposing the instrument to have been a mortgage, and not a bottomry, Lord Tenterden said he doubted whether such an instrument would answer the description of the interest in the policy. Accordingly, his opinion coincided with that of the Common Pleas in the doctrine, that the interest of a mortgagee is not covered by the term " bottomry."

This is a case in which the misdescription of the interest cannot have happened but through mistake. It is to be borne in mind, that the court must make the same rule for both parties, and decide for a return of premium, where there is no loss, in every case where they would decide against a claim for a loss if one had happened. The mistake, supposing the insurance to be held to be valid, cannot prejudice the underwriter, provided the subject, the interest in which is proposed to be insured, can be clearly identified by the description. *The court will*, for these reasons, *be justified in leaning in favor of the validity of the contract*, and, whether the claim be for a return of premium or for a loss, will be inclined to scan the policy very closely, for grounds on which to countervail the misdescription.

468. Charts, one compass or more, and a chronometer, if belonging to the shipowner and requisite for the ship and the voyage, are properly a part of the ship ; and they are allowed as such in some ports at least.<sup>2</sup>

<sup>1</sup> 3 Barnw. & Ad. 50.

so, it seems, in Hamburg. Benecke, In-

<sup>2</sup> They are so allowed in Boston ; not demnity, ed. 1824, p. 459.

## SECTION V. FREIGHT.

469. *Freight*, in the sense of earnings of the vessel, is so commonly insured *eo nomine*, that jurisprudence rarely presents the question what other term, or what phrase, will be equivalent. The usual inquiry is, What interest is covered under this term?

470. A policy on freight generally, for successive passages or for a certain period, usually applies to whatever amount of freight may be pending at different times successively.<sup>1</sup>

471. Where the owner of a ship is also the owner of the cargo, a policy on "freight" will cover the interest on the transportation of the cargo on the voyage, namely, that which he has in placing his goods in another market.<sup>2</sup>

472. A policy on freight "at and from" a place does not cover freight for bringing a cargo to that place.

Freight being insured "at and from Riga in continuation" of a former policy on freight "to the Baltic," &c., the ship was seized at Riga before the outward cargo was discharged, and accordingly the freight outward was lost. Lord Ellenborough ruled that the description did not apply to the freight lost, but to that of the return cargo.<sup>3</sup>

473. Insurance on "freight" generally, to a certain port, is valid, though the cargo is destined to, and the freight payable only on arrival at, a subsequent port.

Where an insurance was "on freight of the ship Bethiah, at and from Bourdeaux to Virginia," and the goods were to be carried in a ship from Bourdeaux to St. Domingo, by the way of Norfolk in Virginia, Lord Kenyon instructed the jury, that the underwriters had a right to expect that the goods, upon which the freight was payable, were consigned to Virginia, and that the

<sup>1</sup> *Hugg v. Augusta Ins. Co.* 7 How. 595. See, as to the amount of the insurable interest to which a policy applies, *Davy v. Hallett*, 3 Caines, N. Y. 16, and other cases cited *infra*, c. 14, s. 1, and *Palmer v. Blackburn*, and other cases cited in the same chapter, s. 2, *Ins. Co. v. Mordecai*, 22 How. 111; and insurance against total loss only is held to cover

total loss of freight pending, though some has been already earned. *Willard v. Millers Ins. Co.* 30 Mo. 35.

<sup>2</sup> *Flint v. Lemmyng*, 1 Barnw. & Ad. 45; 1 Lloyd & W. Cas. 257; *Wolcott v. Eagle Ins. Co.* 4 Pick. Mass. 429; *Dumas v. Jones*, 4 Mass. 647. See also *Hart v. Delaware Ins. Co.* 2 Wash. C. C. 346.

<sup>3</sup> *Bell v. Bell*, 2 Campb. 475.

freight payable, namely, that from Bourdeaux to St. Domingo, being different from the freight described in the policy, the assured was not entitled to recover any thing.<sup>1</sup> But of what importance could it be to the insurers to be informed to what place the goods were to be carried from Norfolk, or in what ship? Lord Ellenborough said, this opinion "was inconsistent with all other cases," and accordingly, upon a policy on freight "from St. Ubes to Portsmouth," the vessel having taken cargo at St. Ubes for Gothenburg, with the intention of putting into Portsmouth on the voyage, he said, "The only question is, whether the freight of a voyage may be insured a part of the way. This was a voyage to Gothenburg by the way of Portsmouth, and the freight was to be earned at Gothenburg. The assureds did not deceive the underwriter when they insured their freight to Portsmouth; they did not tell him that the freight was to be earned there, but only that it was an insurance on freight in that voyage."<sup>2</sup> And judgment was given for the assureds.

So also under insurance on freight from Teneriffe to New York by way of Cuba, the freight of goods taken at Havana was covered.<sup>3</sup>

474. A policy on freight at and from one port to another, with *leave to take goods at intermediate ports, covers the freight of the goods so taken.*

Insurance being made upon freight "from Jamaica to the United Kingdom, with leave to call at any of the West India islands to take on board goods," the description was held to apply to the freight of goods taken on board at Havana.<sup>4</sup>

475. *The description "freight on board" is equivalent to that of "freight" merely:*

Held, that "freight on board" attached to freight under a contract of affreightment as soon as the vessel sailed from Cadiz, on the voyage insured, for Sicily, where the cargo was to be taken, in the same manner as if the policy had been on "freight," without more.<sup>5</sup>

<sup>1</sup> *Murdock v. Potts*, Park. 451; Marsh. 326.

<sup>4</sup> *Barelay v. Stirling*, 5 Maule & S. 6.

<sup>2</sup> *Taylor v. Wilson*, 15 East, 324.

<sup>5</sup> *Robinson v. Manufacturing Ins. Co.*

<sup>3</sup> *Hughes v. Union Ins. Co.* 3 Wheat. 1 Metc. Mass. 143.



476. The rule as to the description of the freight of articles on deck, is the same as in reference to the articles themselves.<sup>1</sup>

*If the articles carried on deck would not be covered under the general description "cargo," "goods," "merchandise," "property," &c., the compensation for so transporting them will not, in the same circumstances, be covered under the general description "freight."*<sup>2</sup>

477. *The assignee of freight as collateral security, or on other valuable consideration, may effect insurance upon it generally, eo nomine.*<sup>3</sup>

478. An agreement to receive a certain proportion of the cargo for transporting it, *in lieu of freight*, or as freight, gives an insurable interest in such proportion of the cargo, which *will be covered under the description "property on board:"*

So held in respect of a cargo of lumber.<sup>4</sup>

479. *The freight of live animals, whether carried above the upper deck, or between decks, will not be covered under the general description of "freight,"* the insurers having no notice of the species of cargo. It was so held under a time policy.<sup>5</sup>

480. *Whether a charterer, who is at the risk of the freight, can cover his interest as "freight" generally, without specifying it?*

It was held in the Supreme Court of New York, Kent, C. J., Thompson, Spencer, Van Ness, and Yates, Justices, that the interest was not covered, on the grounds that it was not "technically freight," — "was founded entirely upon the agreement," — that giving it effect "would be an imposition upon the insurer," unless the circumstances were disclosed, — and that "the owners have a stronger interest in the equipment and management of the vessel than a stranger having no such stake in the voyage."<sup>6</sup>

These grounds are by no means satisfactory, and the decision

<sup>1</sup> See sect. 1, *supra*.

<sup>2</sup> *Adams v. Warren Ins. Co.* 22 Pick. Mass. 163.

<sup>3</sup> *Paradise v. Sun Mut. Ins. Co.* 6 La. Ann. 596.

<sup>4</sup> *Wiggin v. Mercantile Ins. Co.* 7 Pick. Mass. 271.

<sup>5</sup> *Wolcott v. Eagle Ins. Co.* 4 Pick.

Mass. 429. See also *Allegre's Adm'r v. Maryland Ins. Co.* 2 Gill & J. Md. 136; *S. C.* 6 Har. & J. Md. 408.

<sup>6</sup> *Riley v. Delafield*, 7 Johns. N. Y. 522, opinion "Per Curiam." See also *Mellen v. National Ins. Co.* 1 Hall, N. Y. 452.

is opposed to divers others. It has been held that a part-owner who charters the whole vessel can insure the whole freight generally, without any specification of his interest;<sup>1</sup> and that a part-owner who agrees to take the whole ship at his own risk, and make insurance, may insure it generally, without specifying his interest;<sup>2</sup> and that charterers having no ownership, who have agreed to navigate and insure the ship at their own risk, may so insure it.<sup>3</sup>

The doctrine,<sup>4</sup> that an assignee of a subject for a valuable consideration, or by having a mortgage or any lien, at least if accompanied by possession, may make a valid insurance generally, without specifying his particular interest, leads to the same result.

This doctrine, and the cases cited above, certainly authorize the proposition, if any such authority is needed, that *a charterer, who is the only person interested in the freight or a part of it, or is bound by his agreement to insure it, and make it good at all events, may insure it generally, to the amount of his interest, without particularly specifying it.*

481. It has been distinctly held in Massachusetts, that *the charterer may insure the amount of freight which is on his account and risk, under the denomination of "freight;"* and at the same time the *owner may insure his interest in the freight by the same description,*<sup>5</sup> and this doctrine is supported by the cases above cited.

An insurance was made "at and from New York to the port of discharge in the Mediterranean, upon the freight of goods laden or to be laden on board the brig Delia." The assured had sold the vessel with the reservation of the right to receive the freight for the voyage insured, which seems to make his interest precisely that of a charterer who agrees to pay for the use of the vessel at all events.

482. *Money advanced by the charterer to the shipowner, on account of freight,* is sometimes insured under the description of

<sup>1</sup> Taylor v. Wilson, 15 East, 324.

<sup>3</sup> Bartlett v. Walter, 13 Mass. 267.

<sup>2</sup> So held by Parsons, C. J., and his associates, in Oliver v. Green, 3 Mass. 133.

<sup>4</sup> Supra, s. 1.

<sup>5</sup> Clark v. Ocean Ins. Co. 16 Pick. Mass. 289.

"money advanced" for "sailing charges;" "on freight," &c.<sup>1</sup> If the advance is made on the credit of the shipowner, without any assignment or pledge of freight, or lien upon it for reimbursement, it gives no interest in the freight. To connect the advance at all with the freight as a subject of insurance, the reimbursement must be in some way, in some degree, subject to the contingency of freight being earned. If the charterer, by freight being earned, either by carrying his own goods or those of other shippers, is to become liable to pay freight, that is, in effect, is to have a fund in his own hands out of which to reimburse himself for his advances, then he has an interest in the freight to that amount. And if this means of reimbursement arises on his charter-party or other contract, then the interest will range itself under some of the heads of mortgage, assignment, lien with control and disposition of the freight when realized, or trust, already considered in the first section of this chapter. If he has a lien, he may insure freight *eo nomine*, to the amount of his lien,<sup>2</sup> or as "freight advanced."<sup>3</sup>

If the charterer is to lose the amount advanced in case of freight not being earned, then he has that amount of freight wholly at his risk, and may insure freight to such amount, *eo nomine*.<sup>4</sup>

483. *If the charterer is liable, in case of freight being earned, to pay a certain sum to the shipowner, and entitled to receive or realize a greater sum, then his absolute interest in freight is only the excess of the amount to be received over what he is liable to pay.* Such excess, I conceive, is all that he could cover under a general insurance on freight *eo nomine*, or by any other description.

If the amount to be paid by the charterer to the owner is equal to that which he will receive, both depending on the same contingencies, the charterer has no insurable interest in freight, as he can neither gain nor lose by its being earned or lost.<sup>5</sup>

<sup>1</sup> *Etches v. Aldan*, 1 Mann. & R. 157. case of freight not being earned, see *Saunders v. Drew*, 3 Barnw. & Ad.

<sup>2</sup> *Robbins v. New York Ins. Co.* 1 Hall, N. Y. 325. 445; Anonymous, 2 Show. 283. Per *Saunders, C. J., D. Silvale v. Kendall*,

<sup>3</sup> *Sanson v. Ball*, 4 Dall. 459.

3 Maule & S. 37.

<sup>4</sup> On the question of advances on account of freight being reimbursable, in <sup>5</sup> *Cheriot v. Baker*, 2 Johns. N. Y. 346.

484. *It is indifferent, in reference to the description as above, whether the interest in freight is in the whole, or only a certain proportion of it.*<sup>1</sup>

## SECTION VI. SUBJECT OF FIRE POLICIES.

485. Fire is one of the various risks insured against in marine policies, on interests in the ship, freight, or cargo.

Policies against fire on land usually insure against no other risk, and the insurance is mostly upon buildings and their fixed or movable contents.

The terms "goods," "wares," and "merchandise,"<sup>2</sup> are common in the description of subjects, in both species of policies; the other terms of description are mostly different. *The principles of construction as to the description are common to fire and marine policies.*

486. *The subject must be so described that it can be identified.*

Where it cannot be determined to which of two buildings a fire policy is applicable, it is void for uncertainty.<sup>3</sup> The surrounding circumstances and other evidence may doubtless be resorted to in case of this ambiguity, upon the principles and subject to the rules applicable to other written contracts.<sup>4</sup> A policy on a building already insured and an addition not covered by the prior policy without distinguishing between the two, applies to the addition and the excess of the old over prior insurance.<sup>5</sup>

487. *One part of the description may be superseded by another, if the subject is thereby clearly identified.*<sup>6</sup>

488. *It has been held in Kentucky and Louisiana, that a husband, being entitled to the rents of his wife's real estate for life, and having the right of tenancy by the courtesy in case of his*

<sup>1</sup> Sanson v. Ball, 4 Dall. Penn. 459.

<sup>2</sup> Articles kept for use in a building are included in "property," but not in "merchandise." Burgess v. Alliance, Ins. Co.; Same v. New England Ins. Co. 10 All. Mass. 221.

<sup>3</sup> Heath v. Franklin Ins. Co. 1 Cush. Mass. 257.

<sup>4</sup> Supra, No. 126, 130, 131, 132, et seq.

<sup>5</sup> Cronie v. Kentucky Ins. Co. 15 B. Monr. Ky. 432.

<sup>6</sup> Supra, No. 126, 130, 131, 132, et seq.



surviving her, *may make a valid insurance against fire upon it, to its full destructible value, describing it as "his" estate, without specifying his interest, or the capacity in which he insures.*<sup>1</sup> The ground on which the decision must be supported apparently is, that the husband is trustee, and it is his duty to preserve and maintain the estate, and though he has not the absolute legal title, he may, in respect of insurance, as well as other means of maintaining the estate, treat it as a legal trust. If he is not far advanced in life, his actual interest and contingent expectation may be nearly or quite equal in value to the destructible part of the property.

489. *The terms and phrases "stock," "stock in trade," "furniture," "household furniture," and the like, are construed in reference to the description of buildings in which it appears by the policy to be insured, and the business or uses referred to in describing the subject.*

The description "stock in trade," in a specified business, insured against fire, includes, besides the materials, every thing necessary for carrying on that business.<sup>2</sup>

The stock of a mechanic includes his tools and implements; that of a merchant will differ materially from that of a farmer; that of a baker includes his bread-troughs, benches, pans, stoves, scales, weights, sieves, baskets, &c.<sup>3</sup>

A coach-plate maker and cow-keeper was insured on his stock in trade, household furniture, "linen," wearing apparel, and plate. His house was burnt, and with it a large quantity of linen-drapery goods, purchased just before on speculation; and the question arose whether the linen-drapery was comprehended in the description. Lord Ellenborough said to the jury, "I am clearly of opinion that the word linen in the policy does not include arti-

<sup>1</sup> Clarke v. Firemen's Ins. Co. 18 La. 431; Franklin Ins. Co. v. Drake, 2 B. Monr. Ky. 51.

<sup>2</sup> "Stock of a rope-maker" covers stock to be manufactured, not that made up. Wall v. Howard Ins. Co. 14 Barb. N. Y. 383. "Steam saw-mill" includes the machinery; Bigler v. New York Ins. Co. 20 Barb. N. Y. 635.

"Starch manufactory" covers the fixtures requisite for the business; Peoria Ins. Co. v. Lewis, 18 Ill. 553. "Watches, watch trimmings, &c.," covers jewelry usually kept in such a store; Crosby v. Franklin Ins. Co. 5 Gray, Mass. 504.

<sup>3</sup> Moadinger v. Mechanics' Fire Ins. Co. 2 Hall, N. Y. 490.

cles of this description. Here we may apply *noscitur a sociis*; the preceding words are 'household furniture,' and the succeeding, 'wearing apparel;' the linen must be household linen or wearing apparel."<sup>1</sup>

A fire policy upon "stock, household furniture, and wearing apparel, in a grocery and dwelling-house," was held by the Supreme Court of Ohio to cover wearing apparel intended for family use, and stock exposed for sale, but not smuggled articles of linen secretly stowed away, and not openly exposed for sale, no such secreted articles having been mentioned to the insurers, or to their agents, at the time of examining the premises previously to making the policy.<sup>2</sup>

A policy on *furniture in a dwelling-house is applicable to articles stowed in the garret* for want of room in other parts of the house, and not used there, but *brought down and used occasionally in the lower apartments*.<sup>3</sup>

Where M. was insured against fire, "on goods, being stock in trade on consignment, or held in trust," the assured was member of the firm of T. & M., and the goods in question were purchased by that firm, for the price of which T. made his notes payable to M., by whom they were indorsed and paid, and passed to his credit in the books of the firm. They were purchased on the joint account of T. & M., to be sold by T. for their joint account, M. being largely in advance to the concern on account of the purchase. The Supreme Court of Louisiana were of opinion, that the goods were covered under the description of "stock in trade," in a policy effected in the name and on account of M.<sup>4</sup>

A policy in favor of a ship-builder on his stock, consisting of ship-timber, including planks, futtocks, knees, locust, standards, and stagings, contained in a yard bounded by "certain" specified streets, is held by the Supreme Court of New York to cover locust capstans lying on the sides of one of those streets outside of the boundary line of the yard proper, as distinguished from the street, a usage being proved so to place timber on a street adjoining a ship-yard.<sup>5</sup>

<sup>1</sup> Watchborn v. Langford, 3 Campb. 422.

<sup>2</sup> Clary v. Protection Ins. Co. 1 Ohio, 227.

<sup>3</sup> Clarke v. Firemen's Ins. Co. 18 La. 431.

<sup>4</sup> Millaudon v. Atlantic Ins. Co. 8 La. 557.

<sup>5</sup> Webb v. National Fire Ins. Co. 2 Sandf. N. Y. 497.

A policy in favor of a railroad company on cars "on the line of their road and in actual use" covers cars left in the ordinary course of business on tracks connecting but not owned by the railroad.<sup>1</sup>

490. *The description "goods held in trust" will not be construed to apply merely to goods so held in the most strict meaning of that term.*

A policy with that description, effected by a commission merchant, was held to apply to his interest, on account of his advances and commissions, in goods consigned to him.<sup>2</sup>

491. *A fire policy, no less than a marine one, is often applicable to a subject that is changing in value,<sup>3</sup> or in the specific articles constituting it.*

*A policy, for a long period upon goods in a shop, applies to the goods successively in the shop, from time to time.*<sup>4</sup>

A fire policy on "a bark now being built," identifying it, applies to it in whatever state of progress in building.<sup>5</sup>

492. *The term "house" in a policy of insurance, is held in Louisiana to include out-buildings appurtenant to the house.*<sup>6</sup>

So the description "the building on M. street known as D.'s car-factory" may be shown to include a wing in the rear, though there is usually no communication through the wall.<sup>7</sup>

493. A policy on an *unfinished house* does not cover wood-work prepared for it and deposited in an adjoining building.<sup>8</sup>

So, a policy upon "a bark now being built" does not cover spars, blocks, and other articles made for it, and ready to be attached to it, remaining in the yard from which the bark was launched, and near which it lies.<sup>9</sup>

<sup>1</sup> Fitchburg R. R. Co. v. Charlestown Ins. Co. 7 Gray, Mass. 64.

<sup>2</sup> Parks v. General Interest Ins. Co. 5 Pick. Mass. 34. See also Millaudon v. Atlantic Ins. Co. supra. Turner v. Stetts, 28 Ala. 420.

<sup>3</sup> As insurance upon rent: Cushman v. North Western Ins. Co. 34 Me. 487.

<sup>4</sup> Lane v. Maine Fire Ins. Co. 12 Me. 44. Hooper v. Hudson River Ins. Co. 15 Barb. N. Y. 413.

<sup>5</sup> Mason v. Franklin Fire Ins. Co. 12 Gill & J. Md. 468.

<sup>6</sup> Workman v. Ins. Co. 2 La. 507.

<sup>7</sup> Blake v. Exchange Ins. Co. 12 Gray, Mass. 265.

<sup>8</sup> Ellmaker's Ex'rs v. Franklin Fire Ins. Co. 5 Penn. St. 183. An addition intended and included in the survey is covered, when built. Perry Ins. Co. v. Stewart, 19 Penn. St. 45.

<sup>9</sup> Mason v. Franklin Ins. Co. 12 Gill & J. Md. 468. Hood v. Manhattan Ins. Co. 11 N. Y. 532, reversing the case below; 2 Du. N. Y. 191.

494. Under a policy upon a "building and fixtures," parol evidence is not admissible to prove that it was intended to cover furniture.<sup>1</sup>

495. *A policy by lessees on a building occupied for a specified business, does not entitle them to indemnity for loss of the profits, while the damage by fire is repairing.*

So held in respect of buildings occupied as an inn.<sup>2</sup>

#### SECTION VII. SUBJECT OF FISHING VOYAGES.

496. *The subjects in fishing voyages are different from those in mercantile voyages.*

The ship, eo nomine, does not include the outfits. The earnings of the ship, instead of being freight, are, in the American fisheries, a certain proportion of the "catchings," "takings," "fare," "stock," "cargo."

The men, instead of wages, are entitled to a certain proportion of the proceeds of the enterprise, under the denomination of "shares" or "lays."

*The several subjects are accordingly described in policies of insurance on these voyages, partly in different phraseology, and partly in the same terms with different meanings from those in reference to commercial voyages.*

497. The *lines and fishing tackle* of a vessel employed in the Greenland fishery are not comprehended under a policy on the "ship, tackle, and furniture,"<sup>3</sup> nor that of "goods," nor "cargo," but *are comprehended under "outfit,"* which, says Lord Ellenborough, "in a fishing voyage principally consists in the apparatus and instruments necessary for taking fish, seals, &c., and the disposing of them when taken in such manner as to bring home the oil or other produce of the adventure."<sup>4</sup>

In the United States the outfits for a fishing voyage are a distinct subject from the ship, and are generally described as "outfit," which, in that kind of fishery, according to the usage of New

<sup>1</sup> Holmes v. Charlestown Mar. & Fire Ins. Co. 10 Metc. Mass. 211.

<sup>2</sup> Wright v. Pole, 1 Ad. & E. 621; 727.

Wright v. Sun Fire Office, 3 Rawle & Mann. 819.

<sup>3</sup> Hoskins v. Pickergill, 3 Dougl. 222; Park, 97; Marshall, Ins. 2d ed.

<sup>4</sup> Hill v. Patten, 8 East, 373.



Bedford, comprehends, besides the implements and apparatus, and certain supplies taken on board for prosecuting the voyage, one quarter of the catchings in substitution for, and the replacing of, outfits consumed,<sup>1</sup> being a general rule for keeping the amount insured by a policy on the interest filled up, so that the assured, as nearly as may be by any general rule on the subject, have an amount of interest covered by the policy proportional to the premium.

In the American fisheries for cod and mackerel, it seems that the provisions are supplied by the men for themselves, under the description "small general," so that they are not covered by a policy on the ship or its outfit.

#### SECTION VIII. REINSURANCE.

498. *Whether an insurer may effect reinsurance on the insured subject generally, without specifying his interest in the policy?*

It was formerly held in Massachusetts, that in reinsurance the interest must be specifically described to be that arising on an insurance of the same subject by the assured in a former policy. James Prince, having underwritten one policy on the *Columbia and cargo*, another on *property* on board of the *Columbia*, and another on *effects* on board of the same vessel, was reinsured on "the *Columbia and cargo*," with a provision that the reinsurers should indemnify him against all losses on the same amount underwritten by him on a former "policy." It was held that the reinsurance extended to but one of the original policies, which was the policy on "the *Columbia and cargo*," as only this one answered to the description in the policy of reinsurance.<sup>2</sup>

Mr. Christian says, "A reassurance must be expressly mentioned to be a reassurance in the policy."<sup>3</sup> But the case cited by him<sup>4</sup> does not appear fully to support the position.

<sup>1</sup> *Macy v. Whaling Ins. Co.* 9 Mete. Mass. 354. Under this stipulation it is held in Massachusetts that as long as one fourth of the catchings remain on board, the catchings sent home are not covered by the policy and are not salvage to the underwriters. *Mutual Mar. Ins. Co. v. Munro*, 7 Gray, Mass. 246.

<sup>2</sup> *Merry v. Prince*, 2 Mass. 176.

<sup>3</sup> 2 Blackstone Comm. 460, n.

<sup>4</sup> *Andree v. Fletcher*, 2 Term, 161.

The opposite doctrine has been adopted in New York, where it has been held, that an underwriter may effect reinsurance directly on the property insured by him against the risks he has assumed, without specifying that it is a reinsurance, but describing the property as in an original insurance.<sup>1</sup>

This question has not arisen directly in England, but the decision of analogous cases there favors the doctrine adopted in New York. Common carriers, in respect of certain risks assumed by them, stand in the position of underwriters, and it has been held in England, that they may make a direct insurance on goods carried by them, against the risks which they assume as carriers.<sup>2</sup>

So where the assured transferred his ship, agreeing to insure it for the voyage to a certain amount, it was held, that he still had an insurable interest that was covered by the policy on the subject itself; and this, by the terms of his transfer, was, in effect, a reinsurance.<sup>3</sup>

Other cases of a general insurance on indirect interests have been before cited to the same effect.<sup>4</sup>

The reason of getting reinsurance may be that the underwriter thinks unfavorably of the risk, so may the original assured, and it does not appear to be any greater objection to a general insurance in the former case than in the latter. In either case, that of the reassured, as well as the assured, the insured party is bound to disclose to the underwriter all the material unfavorable facts which are not presumed to be known to him, but is not bound to declare his own opinion of the risk.

I therefore conclude the better doctrine to be, that *an assured may effect reinsurance directly on the insured subject against the risks or any part of the risks insured against in the original policy, without any disclosure in the policy, or otherwise, that it is a reinsurance.*

499. *But a practical objection may arise unless a reinsurance is expressed to be such in the policy, especially if made in the common form of either a marine or fire policy, on account of the*

<sup>1</sup> N. Y. Bowery Fire Ins. Co. v. N. Y. Fire Ins. Co. 17 Wend. N. Y. 359.

<sup>2</sup> Crowley v. Cohen, 3 Barnew. & Ad. 478. See supra, No. 424.

<sup>3</sup> Reed v. Cole, 3 Burr. 1512.

<sup>4</sup> Supra, Nos. 419, 420, et seq.

usual stipulations in both relative to notice of prior and subsequent insurance, apportionment of losses, &c.,<sup>1</sup> *which renders it expedient for both parties that it should be so expressed.*

<sup>1</sup> See *Hone v. Mutual Safety Ins. Co.* 1 Sandf. N. Y. 137; *Mutual Safety Ins. Co. v. Hone*, 2 N. Y. 235.

## CHAPTER VI.

### THE PREMIUM.

AT CERTAIN RATE AMOUNT MUST DEPEND ON AMOUNT AT RISK.<sup>1</sup>

500. *THE contract of insurance must include a stipulation for the premium, the amount or the rate per cent. of which is always expressed in the policy.* As the underwriter in a marine policy on goods or freight is liable to loss and entitled to retain the premium only as far as the subject is put at risk, and it does not appear until the risk has commenced what amount will be effectually insured, the policy does not show what amount of premium will be eventually earned. The premium is, therefore, stated in such policies as being at a certain rate per cent. And it is usually so stated in a policy on a ship, though it is a valued one.

501. *The amount intended to be insured appears in some cases, by the policy itself, to be uncertain, as in a policy "on money advanced or to be advanced, for the use of the ship," during an India voyage.*<sup>2</sup>

502. *Under a policy upon cargo or freight, on time, or for successive voyages or passages, it is not unfrequently in contemplation of the parties, that the amount at risk, and covered by the contract, is to vary at successive periods; in which case the apportionment of premium between the successive stages of the risk is often matter of express stipulation, otherwise it is a question of construction, and if so, usage is regarded.*

Where the insurance was on a cargo, to "be valued as interest should appear," for six months, the value of the cargo at risk during that time varied from 1500 to more than 5000 dollars. It was held, on the ground of a usage to that effect in Philadelphia, that the premium was to be estimated at the specified rate on

<sup>1</sup> See chapter 14.

<sup>2</sup> 3 Burr. 1712.



the value on board at successive periods, and for the time during which it remained on board.<sup>1</sup>

503. *In fire policies, and life policies, the amount at risk and that of the premium are usually specified in the policy at a certain sum, without naming the rate per cent., since, the amount insured being usually fixed and remaining the same, that of the premium which will be due is known at the time of making the contract.*

504. "*Running*," or, as they are also called, "*open*" policies, in reference to "*open*" accounts, *applicable to successive shipments or varying amounts of a specified kind of subjects, as goods, goods in trust, goods on consignment, goods to be stored in a certain storehouse, from time to time, &c., are not unfrequently made, in which the amount of premium accruing at successive periods will vary with that of the subject.*<sup>2</sup> In such policies, the rate per cent. of the premium, or some criterion other than the limit of the greatest amount that can be covered, must be stated in the policy, in order to determine how much premium may accrue under it.<sup>3</sup>

The maker of a premium note accompanying an open policy is liable only for premiums on the amount actually insured.<sup>4</sup>

505. *The premium on the whole amount insured is usually considered to be due on delivery of the policy for the whole voyage, or other period of the risk in a marine policy ; for the whole or a certain period or proportion in a fire policy ; and for one year in advance in a life policy ; though not always then wholly payable.*

In many cases the payment of the premium, either in money or a note, is made a condition precedent to the attaching of the policy.<sup>5</sup>

<sup>1</sup> Pollock v. Donaldson, 3 Dall. Penn. 510.

<sup>2</sup> The denomination of "*open*" policy tends to ambiguity, since it is most frequently applied in another sense, in contradistinction to a "*valued*" policy.

<sup>3</sup> Under a stipulation or custom that the rate shall be fixed at the time the risk is declared, it must be fixed before the policy attaches. Orient, &c. Ins. Co. v. Wright, 23 How. 401 ; as to a

waiver of this right see Sun, &c. Ins. Co. v. Wright, 23 How. 412.

<sup>4</sup> Elwell v. Crocker, 4 Bosw. N. Y. 22 ; Lawrence v. McCready, 6 id. 329.

<sup>5</sup> Wallingford v. Home Ins. Co. 30 Mo. 46. See Baxter v. Chelsea, &c. Ins. Co. 1 All. Mass. 294 as to the power of a president, and Sheldon v. Atlantic, &c. Ins. Co. 26 N. Y. 460 as to the power of a general agent, to waive such a provision.

An agreement of a third party to pay,<sup>1</sup> or of the party himself to do some act,<sup>2</sup> will amount to payment so as to satisfy this condition if accepted by the underwriters. A deposit in bank, subject to the order of the underwriters with their or their agent's consent, is sufficient.<sup>3</sup>

A failure to make the stipulated payments at the designated time is generally made to avoid life policies.<sup>4</sup> Under a condition in a life policy that a failure to pay within thirty days after becoming due, the policy is in force if it is paid within that time, though the insured life may have dropped in the mean time.<sup>5</sup>

A company may be liable when the required payment is not made, if the act of its officers has prevented it.<sup>6</sup>

506. *In England, the premium on a marine insurance is payable on demand. The broker, who effects the policy, generally keeps a running account with the underwriters, and gives them credit for the premiums received or due from the assured, out of which he pays such losses as accrue on policies put into his hands by the assured to be settled. He has a similar running account with the assured, whom he charges with the premiums, and credits with losses. He settles with each from time to time, according to the custom of the place, or agreement.*

507. *In England the premium on a marine policy is due from the assured to the broker, and from the latter to the underwriters. The broker has an action against the assured for the premium; and the underwriters against the broker. All other claims and liabilities arising on the policy are between the assured and the underwriters.*<sup>7</sup>

<sup>1</sup> *Bouton v. American L. Ins. Co.* 25 Conn. 542.

<sup>2</sup> *Kentucky, &c. Ins. Co. v. Jenks*, 5 Ind. 96.

<sup>3</sup> *New York, &c. Ins. Co. v. National, &c. Ins. Co.* 20 Barb. N. Y. 468. See also *Hallock v. Commercial Ins. Co.* 2 Dutch. N. J. 268.

<sup>4</sup> This forfeiture is waived by subsequent acceptance of the premium. *Bouton v. American, &c. L. Ins. Co.* 25 Conn. 542; *Buckbee v. United States Ins. and Trust Co.* 18 Barb. N. Y. 541.

<sup>5</sup> *Ruse v. Mutual Benefit L. Ins. Co.* 26 Barb. N. Y. 556, and see *Simpson v. Accidental, &c. Ins. Co.* 2 C. B. N. S. 257. A condition, "annual premium £33 whole term, payable by quarterly instalments of £8 5s. each," was held a condition for quarterly payments. *Phoenix Ass. Co. v. Sheridan*, 8 Hou. L. Cas. 745.

<sup>6</sup> *Belleville, &c. Ins. Co. v. Van Winkle*, 1 Beasl. N. J. 333, and see *McKee v. Phoenix Ins. Co.* 28 Mo. 383.

<sup>7</sup> For the history of this practice and

508. *In the United States an insurance broker is not distinguished from other brokers and agents; not being himself a party in respect of the premium any more than in respect of any other liability or claim arising on the contract negotiated by him for his principal, unless he becomes so by special agreement.*

Where the assured, at the time of effecting the policy, requested the broker to charge him in account with the premium, Sewall, J., giving the opinion of the court, said, "There can be no reason against the action in the name of the broker, where a note has been given to him, or he has become a creditor of the assured at his request."<sup>1</sup>

In the absence of any such special agreement, the parties to the policy are such in respect of the premiums.

509. *In England, very much of the marine insurance is done by individual underwriters, though mutual insurance by shipowners seems to be coming into practice there. Fire and life insurances are done mostly by companies.*

510. *In the United States nearly the whole business of insurance of all kinds is done by companies, stock or mutual, and the premium note, where one is given, is made payable to the company, and if negotiable may be assigned by the company, and the assured thereby made liable to pay it to the indorsee, as in the case of an ordinary negotiable promissory note.<sup>2</sup> These notes, however, are not generally negotiated, and frequently a right is*

the jurisprudence in reference to it, see Marshall, Ins. c. 8, s. 2; *Fowke v. Pensack*, 2 Lev. 153; *Jackson v. Colegrave*, Carth. 338; *Grove v. Dubois*, 1 Term, 112; *Airy v. Bland*, Park, 36; Marshall, Ins. 294; *Bize v. Dickason*, 1 Term, 285; *Edgar v. Fowler*, 3 East, 222; *Edgar v. Bumstead*, 1 Campb. 411; *De Gaminde v. Pigou*, 4 Taunt. 246; *Parker v. Smith*, 16 East, 382; *Minnett v. Forrester*, 4 Taunt. 541; *Cumming v. Forrester*, 1 Maule & S. 494; *Koster v. Eason*, 2 Maule & S. 112; *Parker v. Beasley*, 2 Maule & S. 423; *Houstoun v. Robertson*, 2 Marsh. 138; 6 Taunt. 448; 1 Holt, 88; *Curry v. Bland*, Park,

Ins. 8th ed. 811. It has been held that the underwriters cannot set off premiums due from the broker on other policies against a loss on one issued to the principal by name according to usage at Lloyds not known to the principal. *Watson v. Swann*, 11 C. B. N. S. 756.

<sup>1</sup> *Taylor v. Lowell*, 3 Mass. 331, 352.

<sup>2</sup> The rule seems to be that the entering into the contract of insurance is a sufficient consideration for the making of the note, and that when made it takes the character of an ordinary negotiable promissory note, subject as between the

stipulated for to set off a loss against a note and a note against a loss.<sup>1</sup>

The powers of such companies following the general rule as

original parties to the equities of connected agreements, charter restrictions, &c., and in the hands of third parties, bonâ fide holders, without notice, an absolute undertaking of the character which appears from its face. See *Williams v. Cheney*, 3 Gray, Mass. 215; *New England F. Ins. Co. v. Butler*, 34 Me. 451.

Thus where the original contract of insurance is invalid the note cannot be recovered on by the company. *Lindauer v. The Delaware Ins. Co.* 13 Ark. 461; *Jones v. Smith*, 3 Gray, Mass. 500; *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547; *Washington Co. Mut. Ins. Co. v. Dawes*, 6 Grav, Mass. 376, and see beyond, § 519; the maker, however, cannot set up that through his misrepresentation. *Farmer's Mut. Fire Ins. Co. v. Marshall*, 29 Vt. 23, or want of interest in the insured subject. *New England Mut. F. Ins. Co. v. Belknap*, 9 Cush. Mass. 140, the policy was void, and the note therefore invalid.

Where a note was given for a nominal premium on an open policy, the maker was held liable to the company only for the amount of premiums on risks indorsed and assumed by the company. *Elwell v. Crocker*, 4 Bosw. N. Y. 22; *Lawrence v. McCready*, 6 id. 329.

The note must be the note of the insured, and not of a third person. *Mut. Ben. L. Ins. Co. v. Davis*, 12 N. Y. 569.

A premium note valid when given, is valid notwithstanding the termination of the risk. *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328; *Nash v. Union Mut. Ins. Co.* 43 Me. 343, notwithstanding a total loss of the insured subject. *Bangs*

*v. Skidmore*, 21 N. Y. 136; *Bangs v. McIntosh*, 23 Barb. N. Y. 591, notwithstanding the company has become insolvent. *Caldwell v. Merc. Mut. Ins. Co.* 32 Penn. St. 75; *Alliance Mut. F. Ins. Co. v. Swift*, 10 Cush. Mass. 433; *Clark v. Middleton*, 19 Mo. 53; *Lawrence v. Nelson*, 21 N. Y. 158, notwithstanding the insolvency of the company at the time if it was not known: *Lester v. Webb*, 5 All. Mass. 569; notwithstanding avoidance of the policy by assignment of the subject; *Indiana Mut. F. Ins. Co. v. Coquillard*, 2 Ind. 645; *Smith v. Saratoga, &c. Ins. Co.* 3 Hill, N. Y. 508; contra *M'Culloch v. Indiana Mut. F. Ins. Co.* 8 Blackf. Ind. 50; *Indiana Mut. F. Ins. Co. v. Chamberlain*, 8 id. 150, or other act of the insured party. *Iowa, &c. Ins. Co. v. Prosser*, 11 Iowa, 115, see contra *Keenan v. Missouri, &c. Ins. Co.* 12 Iowa, 126, notwithstanding that the charter of the company expires before the expiration of the policy. *Huntley v. Beecher*, 30 Barb. N. Y. 580, and notwithstanding a cancellation of the policy by agreement between the company and the insured if the note has been negotiated. *Williams v. Cheney*, 3 Gray, Mass. 215. The indorsement may be made by the president without special authority. *Topping v. Bickford*, 4 All. Mass. 120; *Brown v. Donnell*, 49 Me. 421, or by the secretary under mere oral authority. *Leary v. Blanchard*, 48 Me. 269.

<sup>1</sup> As to the effect of such a stipulation where assignees in insolvency guarantee one of several premium notes, and renew the policy to which it is applicable, see *Tripp v. Pacific, &c. Ins. Co.* 7 All. Mass. 230.



to corporations, are limited to those expressed in the act authorizing their formation, and those properly incidental thereto. Of course, contracts of insurance entered into must be such as are authorized, and any others are void.<sup>1</sup>

It has been held in Connecticut that the formation, by a life company, of a guarantee fund consisting of promissory notes, was properly incidental to their business.<sup>2</sup>

A mutual company may not divide itself into classes in the absence of statutory authority.<sup>3</sup> In New York, under the statute of 1849, a company might change its name, and become a new company.<sup>4</sup>

A statute prohibiting insurance companies from insuring an amount exceeding one tenth of the capital of the company on one risk was held not to apply to mutual insurance companies.<sup>5</sup>

For various reasons, it frequently happens that companies chartered or organized under the laws of one State have agencies in one or more of the other States. In the absence of statutory prohibition contracts of insurance made by such agents are valid.<sup>6</sup> The supposed necessity of a supervision of the management of insurance companies by state officers for the protection of parties

<sup>1</sup> The company's proper name must be used. *Hambro' v. Hull, &c. Ins. Co.* 3 Hurlst. & N. Exch. 789. A contract of insurance made by an agent of an insolvent company two days after insolvency without knowledge of that fact on his part, with another company, was held invalid. *Carrington v. Commercial F. Ins. Co.* 1 Bosw. N. Y. 152. See *Williams v. Babcock*, 25 Barb. N. Y. 109, as to time of commencement of ability to contract. As to the effect of mistakes of officers in classifying risks as required by charter, see *Union, &c. Ins. Co. v. Keyser*, 32 N. H. 313.

<sup>2</sup> *Hope, &c. Ins. Co. v. Weed*, 28 Conn. 51; contra *Trenton Ins. Co. v. McKelway*, 1 Beasl. N. J. 133.

<sup>3</sup> *People's Eq. Mut. F. Ins. Co. v. Arthur*, 7 Gray, Mass. 267. That members are bound by such a division made

under statutory authority, and cannot object that the statute was not formally adopted where a practical adoption has taken place. *Citizens' Mut. F. Ins. Co. v. Sortwell*, 8 All. Mass. 217; see *Jenkins v. Union, &c. Ins. Co.* 39 N. H. 172.

<sup>4</sup> *Hyatt v. McMahon*, 25 Barb. N. Y. 457. In England, a company in which the policy-holders were entitled to share in the profits, transferred its property to another, which agreed to assume its liabilities. Held, that a policy-holder in the first company had no cause of action. *King v. Accumulative Life Fund, &c. Co.* 3 C. B. N. s. 151.

<sup>5</sup> *Williams v. Cheney*, 3 Gray, Mass. 215; *Atlantic Mut. F. Ins. Co. v. Concklin*, 6 Gray, Mass. 73.

<sup>6</sup> *Kennebec Co. v. Augusta Ins. & Bank. Co.* 6 Gray, Mass. 204.

insuring, and perhaps other causes, have led to legislation in some, if not all the States of the United States, imposing restrictions on foreign companies as a condition prerequisite to the legal transaction of business.<sup>1</sup> These are generally the requirement of filing sworn statements of the financial condition of the company at fixed periods with a designated officer of the State, and that agents shall give bonds, the appointing certain agents, and similar acts. Where such restrictions exist a contract effected by a foreign company, which has not complied with the statute at the time of making the contract,<sup>2</sup> is held void,<sup>3</sup> at least in the State imposing the restrictions.<sup>4</sup> And no one can act as agent of the company in such State.<sup>5</sup>

As the term of credit in marine policies commonly exceeds the usual length of the voyage, it is in most instances known before the premium note is payable, whether any claim has accrued for a loss or return of premium, and only the excess of the demand of either party over that of the other is actually paid.<sup>6</sup>

511. *In mutual fire insurance in the United States, the insurers usually have a lien on the insured building and the land belong-*

<sup>1</sup> Such compliance is presumed, it is said, in the absence of any evidence to the contrary in an action on the premium note. *Williams v. Cheney*, 3 Gray, Mass. 215. As to what constitutes a compliance with the requirements of the various statutes, see *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547; *Hart v. Achilles*, 28 Barb. N. Y. 576; *Atlantic Mut. F. Ins. Co. v. Concklin*, 6 Gray, Mass. 73; *Washington, &c. Ins. Co. v. Hastings*, 2 All. Mass. 398.

<sup>2</sup> *Atlantic Mut. F. Ins. Co. v. Concklin*, 6 Gray, Mass. 73.

<sup>3</sup> *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547; *Ælina Ins. Co. v. Harvey*, 11 Wisc. 394; but see *Burns v. Provincial Ins. Co.* 35 Barb. N. Y. 525; *National, &c. Ins. Co. v. Pursell*, 1 All. Mass. 231. The premium note, also, is void in the hands of the payee. *Jones v. Smith*, 3 Gray, Mass. 500; *Washington Ins. Co. v. Hastings*, 2 All. Mass.

398, but not in the hands of a bonâ fide indorsee for value without notice of non-compliance. *Williams v. Cheney*, 8 Gray, Mass. 215. And see generally, as to how far compliance is necessary, *Lester v. Webb*, 5 All. Mass. 569.

<sup>4</sup> See *Huntley v. Merrill*, 32 Barb. N. Y. 626.

<sup>5</sup> *People v. Imlay*, 20 Barb. N. Y. 68. Such non-compliance is, however, no defence for an agent in a suit against him by the company to recover a balance of premiums due, brought in the State where the company is chartered. *Washington Co. Ins. Co. v. Colton*, 26 Conn. 42.

<sup>6</sup> By a by-law of a Maine insurance company, the policy when executed and recorded is binding, though no premium note has then been given. *Warren v. Ocean Ins. Co.* 16 Me. 439; and see *Belleville, &c. Ins. Co. v. Van Winkle*, 1 Beasl. N. J. 333.

ing to it, to secure the payment of the premium note or any assessments for which the policy is liable for raising funds to pay losses.<sup>1</sup>

512. The usual form of the policy contains a *clause by which the insurers confess themselves to have been paid the premium.*

Where a negotiable note is given for the premium, this is a sufficient payment to be the ground of such a receipt. In England, where such a note does not appear to be usually given, questions have arisen respecting the effect of this acknowledgment.

Mr. Marshall<sup>2</sup> says, "An action will lie for the premium, notwithstanding this formal acknowledgment of the receipt of it in the policy, which is not inserted there as conclusive evidence of the actual payment, but to preclude the necessity of proving it in case of loss." The same reason is given by Mr. Campbell.<sup>3</sup>

In acknowledging the receipt of the premium, the parties adopt the form used in deeds of conveyance of land, which contain a like acknowledgment. The same form is used in other instruments.

It is very proper that the receipt of the premium should be acknowledged in England, where it is paid at the time of subscribing the policy, or is a debt due from the assured to the broker, who, instead of the assured, becomes the debtor of the insurer; or in the United States, where it is paid, or the assured makes a promise in writing to pay it. If an underwriter in the United States acknowledges a receipt of the premium, without receiving a note, or in England, without the intervention of a broker, he subscribes an instrument in a form adapted to the general practice, when he himself departs from that practice. According to the general practice, the acknowledgment is substantially true.

513. *In regard to the effect of the acknowledgment, it was formerly made a question, whether the underwriter could, notwithstanding it, maintain an action against the assured for the premium.*<sup>4</sup>

It was supposed that such an action might be maintained,

<sup>1</sup> It is the duty of the administrator to pay off premiums and discharge the lien. *Tuttle v. Robinson*, 33 N. H. 104.

<sup>2</sup> *Marshall*, Ins. 335.

<sup>3</sup> 1 Campb. 534, n.; *Sheldon v. Atlantic, &c. Ins. Co.* 26 N. Y. 460.

<sup>4</sup> *Park*, Ins. 35; *Marshall*, Ins. 335.

which led to the above ingenious construction, as Mr. Park considers it, of the acknowledgment.

There are English cases in which the insurer has recovered the premium of the assured, where, if he had not, an effect would have been given to fraudulent dealing. *F.*, of Pillau, promised a consignment of goods to *G.*, of London, a young man just beginning business, who obtained insurance on the goods upon the credit of this promise, the insurers supposing he would thus be supplied with funds to pay the premium. *F.* consigned the goods to another merchant, and, a loss happening, and a claim for return of premium accruing, the insurer claimed the right to set off the premium. The court allowed it, with severe remarks on the conduct of *F.*<sup>1</sup>

In another case, *H.*, an insurance broker, being indebted to *S.*, and not able to pay him, *S.* proposed that *H.* should procure insurance for him until the premiums should amount to his debt. Thus *H.* would be left indebted to the insurers for the premiums, and *S.*'s debt be discharged. The insurances were accordingly effected. But the insurers, learning the purpose of the broker and the assured, brought suits against *S.* for the premiums. The jury, however, being of opinion that the broker alone was debtor for these, found in favor of the assured. But the court was dissatisfied with their verdict, and would have granted a new trial had not the matter been settled by the parties.<sup>2</sup>

514. *Where there is no such reason for controlling the effect of the acknowledgment, the insurer has been held in England to be estopped by it from demanding the premium of the assured, and from denying, as between himself and the assured, that he had received it.*<sup>3</sup>

515. *It does not appear that there is any material distinction between this acknowledgment in a policy of insurance and in other instruments,*<sup>4</sup> — respecting which the prevailing doctrine is, that the acknowledgment of payment in a deed of conveyance, though

<sup>1</sup> *Foy v. Bell*, 3 Taunt. 492.

<sup>2</sup> *Mavor v. Simeon*, 3 Taunt. 497, n.

<sup>3</sup> *Dalzell v. Muir*, 1 Campb. 532;  
*Cumming v. Forrester*, 1 Maule & S.  
499.

<sup>4</sup> *Pennsylvania Ins. Co. v. Smith*, 3

*Whart. Penn.* 520; *Anderson v. Thornton*, 8 Exch. 425; 20 Eng. L. & Eq. 339;  
*Troy F. Ins. Co. v. Carpenter*, 4 Wisc.  
20; *Goit v. Nat. Protection Ins. Co.* 25  
*Barb. N. Y.* 189.



*it estops the grantor from alleging want of consideration, is only prima facie evidence of payment, which may be rebutted;*<sup>1</sup> especially in reference to a third party,<sup>2</sup> or in reference to a question of mistake, or to fraud by another party than the one offering evidence to contradict the acknowledgment.<sup>3</sup>

516. *Where the underwriter knowingly accepts the agreement of another than the assured, to pay the premium, the assured is discharged from liability for it, independently of any acknowledgment of the receipt of it in the policy.*<sup>4</sup>

But as marine policies in the United States generally contain a provision that the underwriter shall have a right to set off the premium, if unpaid, against any loss that may accrue on the policy, this subjects the assured to such set-off, though the broker's note for the premium may have been taken by the underwriter knowing him not to be the assured.<sup>5</sup>

517. *If the underwriters have no reason to suppose, from the application or otherwise, that the policy is effected for any other than the applicant, it has been held that, though the agent gives his note for the premium, his principal, the party actually insured, is liable for it to the insurers.*<sup>6</sup>

So, where the party effecting a policy "for whom it might concern" gave his negotiable note for the premium, on a shipment of goods of which he was to have the profit and bear the loss, it was held in Pennsylvania, that the owner of the goods was liable for the premium.<sup>7</sup>

518. *Authority to effect a policy, is such to sign a note for the premium as agent of the assured, where it is customary to give such notes, and the principal is conusant of the custom.*<sup>8</sup>

<sup>1</sup> See numerous cases cited in 1 Greenleaf, Ev. s. 29, n. and 1 Phillipps, Ev. by Cowen, p. 108, n. 194, and p. 549, n. 964; Tyler v. Carlton, 7 Me. 175; Belden v. Seymour, 8 Conn. 304; M'Crea v. Purmont, 16 Wend. N. Y. 460; Bowen v. Bell, 20 Johns. N. Y. 338; Sheldon v. Atlantic, &c. Ins. Co. 26 N. Y. 460.

<sup>2</sup> Mellick v. Peterson, 2 Wash. C. C. 31.

<sup>3</sup> Wilkinson v. Scott, 17 Mass. 249; Clapp v. Tirrill, 20 Pick. Mass. 247.

<sup>4</sup> Bouton v. American Mut. L. Ins. Co. 25 Conn. 542; Power v. Butcher, 10 Barnew. & C. 329.

<sup>5</sup> Hurlbut v. Pacific Ins. Co. 2 Sumn. C. C. 471; Cobb v. N. E. Mut. Mar. Ins. Co. 6 Gray, Mass. 192.

<sup>6</sup> Patapseo Ins. Co. v. Smith, 6 Harr. & J. Md. 166; Pennsylvania Ins. Co. v. Smith, 3 Whart. Penn. 520.

<sup>7</sup> Pennsylvania Ins. Co. v. Smith, 3 Whart. Penn. 520.

<sup>8</sup> Stackpole v. Arnold, 11 Mass. 27.

519. *A negotiable note for the premium of an illegal insurance, payable to the broker or his order, cannot be recovered.*<sup>1</sup>

520. *A risk incurred being requisite to make a premium due, it is in the power of the assured, by not putting the whole or a part of the property at risk within the terms of the policy, to defeat the contract in whole or in part.*

*This is an indulgence allowed by the law to this species of contract, and is considered to be an implied condition upon which it is entered into, because it is often impossible, at the time of effecting the policy, for the assured to know whether any or what part of the property insured will be at risk; and it would be a hardship, and a great discouragement to insurance, if the assured were obliged to pay the premium where no risk is run by the insurer, merely because he is ready to run the risk.*

521. *According to the French law, where the premium is for a voyage out and home, and the vessel arrives at her port of destination, but the risk on the homeward voyage does not commence, only two thirds of the premium will become due.*<sup>2</sup>

522. *In the United States, according to the provisions of the policies of some ports, and according to the practice in, at least, some others, where the policies contain no provision on the subject, the premium, though entire for the voyage round, or for successive passages, becomes due only for those passages which are commenced; and if any passage is not commenced, the proportional part of the premium for that passage does not become due, unless a loss has taken place on the previous passages.*<sup>3</sup>

523. *The fund raised by premiums is the resource of insurance companies, whether marine, fire, or life, for the payment of losses. Stock companies and companies mixed, of a stock and mutual character, depend, besides, on the amount of capital paid in.*<sup>4</sup> *Some mutual insurance companies, as well as some mixed and stock companies, provide for the personal responsibility of the members, or grant liens on their property, for assessments and contributions for the same purpose, in addition to the paid premiums.*

<sup>1</sup> Russell v. Degrand, 15 Mass. 35; n. 185, 187; Code de Commerce, No. Gray v. Sims, 3 Wash. C. C. 276. And 356.  
see ante, No. 510, notes.

<sup>3</sup> See chap. xxii.

<sup>2</sup> Emerigon, c. 3, s. 1; Pothier, Ass. <sup>4</sup> See Shaughnessy v. Rensselaer Ins. Co. 21 Barb. N. Y. 625.

In many mutual, marine, and fire companies, an amount is paid in or a promissory note is given by members, having the double character of premiums advanced and capital, or of premium notes and stock notes, being at first capital, or stock notes, and assuming the character of paid premiums, or premium notes, by degrees, from time to time, as the member may effect insurances, until his premiums shall cancel the whole amount of his advanced payment or notes.

Insurance companies, both fire and marine, are chartered in the different States with a great variety of such provisions, for advancing funds or making good the deficiency of premiums for the payment of losses.

An act which was passed in New York in 1843, called the Pattern Act, authorizes the voluntary formation of mutual insurance companies, the members of which are required to give their promissory negotiable notes in advance, to a certain amount, to set off against premiums on policies to be subsequently effected, equivalent to the notes and interest. Where the same had been discounted to raise funds to meet liabilities, the subscribers are held to be liable to the indorsees for their full amount, though insurance had been made in favor of the same subscribers, the premiums on which would have been subject to be set off on the notes, had the same remained in possession of the association.<sup>1</sup> And the same rule prevails in respect to a note substituted for the original deposit note for a part of its amount.<sup>2</sup>

The agreement of the company to take risks, and the similar notes and agreements made by other members, and the interest to be allowed to the maker of the note on its excess over his premiums at the end of each year, were all held to be a sufficient consideration for the note, besides that, by virtue of the statute the notes were valid independently the consideration.<sup>3</sup>

<sup>1</sup> *Deraismes v. Merchants' Mut. Ins. Co.* 1 N. Y. 371; *Cruikshank v. Brouwer*, 11 Barb. N. Y. 228; and see *Merchants' Mut. Ins. Co. v. Rey*, 1 Sandf. N. Y. 184; *Hone v. Ballin*, 1 Sandf. N. Y. 181; *Elwell v. Crocker*, 4 Bosw. N. Y. 22; *Lawrence v. McCready*, 6 id. 329.

<sup>2</sup> *Crooke v. Mali*, 11 Barb. N. Y. 205.

<sup>3</sup> *Deraismes v. Merchants' Mut. Ins. Co.* 1 N. Y. 371; confirmed in *Brown v. Crooke*, 4 N. Y. 51. That such notes need not be made payable within a year, *Howland v. Edmonds*, 33 Barb. N. Y. 433.

A bonâ fide settlement of account and estimated liabilities, with the maker of such a deposit note by an authorized officer of the company, and surrender of it to be cancelled, the maker having sold his insured property, was held by the Supreme Court of New York to exonerate him from further liability for prior as well as for subsequent losses.<sup>1</sup>

A member of an insurance company being entitled to have the amount of payments for premiums on policies issued on his application indorsed on his deposit note, is held by the Superior Court of New York to be entitled to credit, in like manner, for premiums which he procures to be paid by others.<sup>2</sup>

Where such a note is made payable to the maker's order, and deposited with the association without being indorsed by him, a court of equity will enjoin him to indorse the note that the association may get the same discounted, and apply the proceeds in discharging its liabilities.<sup>3</sup>

The maker of such a note is liable for the same to the association, so far as its payment is necessary to meet the liabilities of the company, though insurance has been made in favor of the maker, and no premium has accrued on account of the note.<sup>4</sup> And the liability on such a renewed note is the same as on the original one.<sup>5</sup> And if such a note is given up to the maker by the trustees of the association without its payment, the receiver appointed for the settlement of its concerns may, notwithstanding, recover against the maker the excess of the amount of the note over that of the premiums to be credited to him upon it.<sup>6</sup>

Where the maker took out a large policy, and gave a note for the premium, intending that it should figure as part of the available funds in an exhibit of the concerns of the association, it was held that the same must be considered to have been given as security for the liabilities of the association, and not as a premium note on the particular outstanding policy, and that the maker was liable upon it accordingly.<sup>7</sup>

<sup>1</sup> *Hyde v. Lynde*, 4 N. Y. 387.  
Corresponding agent cannot make such agreement. *Marblehead, &c. Ins. Co. v. Underwood*, 3 Gray, Mass. 210.

<sup>2</sup> *Emmet v. Reed*, 4 Sandf. N. Y. 229.

<sup>3</sup> *Furness v. Gilchrist*, 1 Sandf. N. Y. 53.

<sup>4</sup> *Brower v. Appleby*, 1 Sandf. N. Y. 158.

<sup>5</sup> *Hone v. Folger*, 1 Sandf. N. Y. 177.

<sup>6</sup> *Brower v. Hill*, 1 Sandf. N. Y. 629.

<sup>7</sup> *Brower v. Hill*, 1 Sandf. N. Y. 629.



Where the by-laws of a company required that the assignee of shares should be liable for assessments for losses, and an assignment of shares expressing such liability was made to A, who had purchased the shares for B, and taken the assignment of them in his own name in the absence of B, for whom he intended to hold them, and signed an acknowledgment accepting them "on the conditions named in the transfer," A was held to be liable for the assessments, B's interest not appearing in the transfer.<sup>1</sup>

An estate insured against fire in a mutual company, being subject to a lien for the premiums, having passed through the hands of several proprietors by descent and sale, who were successively members of the company, the premium being in arrears in the mean time, the successive proprietors are personally liable for the premium accruing during their respective proprietorships.<sup>2</sup>

523 *a*. In mutual insurance companies the person effecting insurance becomes a member of the company,<sup>3</sup> and usually, besides paying a portion of the premium in money, gives a premium-note for the balance.<sup>4</sup>

Persons so becoming members are held to have given these notes with a knowledge of the charter and by-laws of the company.<sup>5</sup> They are liable to pay assessments<sup>6</sup> on their premium-notes sufficient to meet all losses<sup>7</sup> occurring while they are mem-

<sup>1</sup> *Long v. Pennsylvania Ins. Co.* 6 Penn. St. 421.

<sup>2</sup> *Shirley v. Mutual Ass. So.* 2 Rob. Va. 707.

<sup>3</sup> *Belleville, &c. Ins. Co. v. Van Winkle*, 1 Beasl. N. J. 333.

<sup>4</sup> The distinction between stock-notes, or notes given to constitute a capital as a condition prerequisite to the commencement of business and premium-notes, becomes very material, in view of the absolute liability for the full amount of the stock-note on its becoming due, and the special liability to necessary assessments only on the premium-notes in the hands of the company. See *White v. Haight*, 16 N. Y. 310; *Dana v. Munson*, 23 id. 564; *Howland v. Edmonds*, 24 id. 307; *Hart v. Achilles*, 28 Barb.

N. Y. 576; *Bell v. Shibley*, 33 id. 610; *Sands v. St. John*, 36 Barb. N. Y. 628; *Tuckerman v. Brown*, 33 N. Y. 297.

<sup>5</sup> And where the charter limits the liability of members on the premium-notes to a proportionate assessment to cover losses, this is the extent of liability on a note absolute on its face in the hands of the company. *Mut. Ben. L. Ins. Co. v. Jarvis*, 22 Conn. 133. A member cannot object on suit for assessment that the company did not give notice of the acceptance of its charter. *Traders, &c. v. Stone*, 9 All. Mass. 483.

<sup>6</sup> *Devendorf v. Beardsley*, 23 Barb. N. Y. 656.

<sup>7</sup> *Shaughnessy v. Rensselaer Ins. Co.* 21 Barb. N. Y. 605; *Marine Mut. &c. Ins.*

bers,<sup>1</sup> which are assessed pro rata<sup>2</sup> on all the members liable,<sup>3</sup> and which are made within the period fixed by the contract of insurance,<sup>4</sup> the by-laws of the company,<sup>5</sup> or the statutes of the State.<sup>6</sup>

The assessments must be made by an authorized person,<sup>7</sup> and must be for a specified amount.<sup>8</sup>

It is a common condition that a failure to pay any one assessment on such notes, shall render the maker liable for the whole amount. This provision is in the nature of a penalty,<sup>9</sup> will not be enforced in another State,<sup>10</sup> does not subject the maker to

*Co. v. Swanton*, 49 Me. 448. But the assessment must not be excessive. *Bangs v. Gray*, 15 Barb. N. Y. 264; *People's, &c. Ins. Co. v. Babbitt*, 7 All. Mass. 235; *Traders, &c. Ins. Co. v. Stone*, 9 All. Mass. 483. It need not be precisely accurate. *New England Mut. F. Ins. Co. v. Belknap*, 9 Cush. Mass. 140. An overlay of one third was held not to be unreasonable in *People's, &c. Ins. Co. Petitioners*, 9 All. Mass. 319. As to whether it must be for losses only, see *Jones v. Sisson*, 6 Gray, Mass. 288.

<sup>1</sup> *New Hampshire Mut. F. Ins. Co. v. Rand*, 24 N. H. 428; *Long Pond Mut. F. Ins. Co. v. Houghton*, 6 Gray, Mass. 77; *Neely v. Onondago Co. Mut. F. Ins. Co.* 7 Hill, N. Y. 49. And see ante, § 510, note.

<sup>2</sup> *Mut. Ben. L. Ins. Co. v. Fuller*, 14 Barb. N. Y. 373. Without regard to the proportion paid in cash and notes. *Marblehead Mut. F. Ins. Co. v. Hayward*, 3 Gray, Mass. 208, or the rate of premium. *Shaughnessy v. Rensselaer Ins. Co.* 21 Barb. N. Y. 608, and see *Bangs v. Gray*, 12 N. Y. 477. The assessment need not include notes cancelled by the directors as worthless. *Maine Mut. &c. Ins. Co. v. Neal*, 50 Me. 301.

<sup>3</sup> *Marblehead Mut. F. Ins. Co. v. Hayward*, 3 Gray, Mass. 208.

<sup>4</sup> Even where it had been voted to cancel the policy on a day previous to laying the assessment. *Fayette, &c. Ins. Co. v. Fuller*, 8 All. Mass. 27, and see *Columbia, &c. Ins. Co. v. Stone*, 3 All. Mass. 385.

<sup>5</sup> *Hill v. Reed*, 16 Barb. N. Y. 280; *Bay State, &c. Ins. Co. v. Sawyer*, 12 Cush. Mass. 64.

<sup>6</sup> Where the statutes and by-laws are inconsistent, the assessment must conform to the statute. *Thomas v. Achilles*, 16 Barb. N. Y. 491.

<sup>7</sup> See *Appleton Mut. F. Ins. Co. v. Jesser*, 5 All. Mass. 446. An assignee for the benefit of the creditors cannot make it. *Hurlbut v. Carter*, 21 Barb. N. Y. 221; in New York, by statute a receiver may. *Shaughnessy v. Rensselaer Ins. Co.* 21 Barb. N. Y. 605. As to the limits of a receiver's power in such cases, see *Thomas v. Whallon*, 31 Barb. N. Y. 172.

<sup>8</sup> *St. Lawrence, &c. Ins. Co. v. Paige*, 1 Hilt. N. Y. 430; *Bangs v. Duckinfield*, 18 N. Y. 592.

<sup>9</sup> *Missouri, &c. Ins. Co. v. Spore*, 23 Mo. 26.

<sup>10</sup> In *Jones v. Sisson*, 6 Gray, Mass. 288, such a condition, with a provision for ultimate refunding, was held not penal and enforceable in another State.

interest,<sup>1</sup> and is strictly limited to assessments.<sup>2</sup> A provision requiring publication of an assessment is satisfied by personal notice to the person to be charged, or by a vote of the company.<sup>3</sup> A notice of an assessment to bind members must specify the amount in New York, but need not in New Hampshire or Maine.<sup>4</sup>

Mutual companies may, however, issue policies with paid-up premiums, and no further liability on the part of the insured, in New York, under the statute of 1849.<sup>5</sup>

523 *b.* A loan on bottomry or respondentia security, is an insurance of the hypothecated subject by the lender against the risks specified in the instrument of hypothecation. In this contract *the excess of the agreed marine interest over common interest, is the premium.*

The marine interest may be stipulated for a certain number of years or months, but is usually for a certain voyage, or succession of voyages, or passages.<sup>6</sup> This stipulation for marine interest is an essential characteristic of a bottomry or respondentia contract.<sup>7</sup> If the subject is not exposed to the specified risks, marine interest does not accrue,<sup>8</sup> as in case of an inadequate description of the subject, or of the bond being void from any cause without fraud of the borrower. So in case the bond is good for only a part of the amount proposed to be hypothecated, by reason of a part only being put at risk, the marine interest is reduced proportionally,<sup>9</sup> though the borrower may be answerable in damages by his failing to put at risk the stipulated amount. So the rate of marine interest may be reduced by a court of admiralty on account of its exorbitancy. The risk having once begun,

<sup>1</sup> *Bangs v. McIntosh*, 23 Barb. N. Y. 591.

<sup>2</sup> *Bangs v. McIntosh*, 23 Barb. N. Y. 591.

<sup>3</sup> *Atlantic F. Ins. Co. v. Sanders*, 36 N. H. 252.

<sup>4</sup> *Bangs v. Duckinfield*, 18 N. Y. 592; *Atlantic F. Ins. Co. v. Sanders*, 36 N. H. 252; *York, &c. Ins. Co. v. Knight*, 48 Me. 75.

<sup>5</sup> *Mygatt v. New York, &c. Ins. Co.*

21 N. Y. 52; *Union Ins. Co. v. Hoge*, 21 How. 35.

<sup>6</sup> Boulay Paty, Droit Com. tit. 9, s. 3, tom. 3, p. 63, ed. 1822; *The Mary Ann*, 4 Notes of Cases, 376.

<sup>7</sup> *Leland v. The Medora*, 2 Woodb. & M., C. C. 92.

<sup>8</sup> Boulay Paty, Droit Com. tit. 9, s. 13. tom. 3, p. 168, ed. 1822; *Marshall, Ins. book 2, c. 1, p. 736*, 2d edition.

<sup>9</sup> *The Prince George*, 4 Moore, Priv. Counc. 21.

the marine interest for the passage, voyage, or period entered upon, becomes due, though the risk may not continue for the entire voyage or period.<sup>1</sup> The marine interest ceases at the termination of the voyage or period for which the loan is made.<sup>2</sup>

<sup>1</sup> Boulay Paty, *Droit Com.* tit. 9, s. 3, tom. 3, p. 78, ed. 1822; *The Dante*, 1 W. Rob. Adm. 427; 4 *Notes of Cases*, 408; *Marshall, Ins.* book 2, c. 4, p. 751.

<sup>2</sup> Boulay Paty, *Droit Com.* tit. 9, s. 5, tom. 3, p. 90, ed. 1822. Boulay Paty (tom. 3, p. 119) discusses the question whether the common interest which begins to run as soon as the borrower is

in default by non-payment, is confined to the principal originally lent, or upon the amount of the principal and the marine interest. Mr. Marshall (*Ins.* book 2, c. 4, p. 752, ed. 1822) states the former rule, citing Pothier and Emerigon. Mr. Justice Story adopts the latter. *The Ship Packet*, 3 Mas. C. C. 255.



## CHAPTER VII.

### REPRESENTATION AND CONCEALMENT.

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|---|---|
| <p>SECT. 1. What is a representation or concealment.</p> <p>2. To what time the doctrine of representation refers.</p> <p>3. Revocation of the order.</p> <p>4. Representation or concealment by an agent.</p> <p>5. Construction of a representation.</p> <p>6. What facts must in general be disclosed, and in what manner.</p> <p>7. Species of property, and nature of the interest.</p> <p>8. Usages of the trade need not be disclosed.</p> <p>9. Evasion of foreign commercial and municipal regulations.</p> <p>10. Matters of express stipulation in the policy.</p> | <p>SECT. 11. Matters of implied warranty or stipulation.</p> <p>12. What kinds of intelligence must be communicated.</p> <p>13. Time of sailing or being spoken.</p> <p>14. National character and belligerent risk.</p> <p>15. Representation and concealment in insurance against fire.</p> <p>16. Representation and concealment in life insurance.</p> <p>17. Presumption from the rate of premium.</p> <p>18. The withdrawing, superseding, or waiver of a representation.</p> <p>19. Compliance with a representation.</p> <p>20. Effect of a concealment or misrepresentation.</p> |
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#### SECTION I. WHAT IS A REPRESENTATION OR CONCEALMENT.

524. *A REPRESENTATION in insurance is the communication of a fact, or the making of a statement, by one of the parties to a contract of insurance to the other, in reference to a proposal for their entering into the contract, tending to influence his estimate of the character and degree of the risk to be insured against.*

*To constitute a representation, says Mr. C. J. Marshall, there should be an affirmation or denial of some fact, or an allegation which plainly leads the mind to an inference of a fact.*<sup>1</sup>

<sup>1</sup> *Livingston v. Maryland Ins. Co.* 7 Cranch, 535, &c.; and see *Murgatroyd v. Crawford*, 3 Dall. Penn. 491; *N. Y. Firemen's Ins. Co. v. Welden*, 12 Johns. N. Y. 513, per Chancellor Kent; *Richards v. Murdock*, 1 Lloyd & W. 132; 10 Barnew. & C. 527. See also 2 Duer, Mar. Ins. Lect. 14, s. 1-8, pp. 643-656, for criticisms on the definitions of a representation, and *ibid.* s. 8, p. 256, for Mr. Duer's definition. See also 1 Arnould, Mar. Ins. part 2, c. 1, s. 2, p. 489, for a definition.

525. *A fact or statement having such tendency is called a MATERIAL fact or statement.*

*One having no such tendency is called IMMATERIAL.*

526. *A representation may be an oral or written statement of the party or his agent, or the exhibition of a letter or a newspaper, or by other mode of communication.*

527. *So a representation may be by mere implication by the policy itself, by a separate writing, or by words spoken.*<sup>1</sup>

Thus, in insurance from Genoa to Dublin, "the adventure to begin from the loading to equip for the voyage," was held by Lord Mansfield and his associates to imply, if it did not literally stipulate, that the cargo was to be loaded at Genoa, and the policy was defeated by its being loaded at Leghorn, which at the time materially enhanced the risk.<sup>2</sup>

So a stipulation "to return five per cent. for convoy," was considered by Lord Eldon to imply a probability of convoy.<sup>3</sup>

So a recital in the policy that the vessel "was expected to be loaded between the 13th and 20th of September," was held to be an implied representation that the assured had no knowledge of her being loaded before the 13th.<sup>4</sup>

Insurance of freight of an American vessel from the Swedish island of "St. Thomas," to "Havana," was ruled by Mr. Justice Cranch not to be an implied representation that the cargo was taken aboard at St. Thomas, and it was ruled that the policy was not defeated by the fact of the cargo having been put aboard at Buenos Ayres, then in revolt and at war with Spain.<sup>5</sup>

A party insured against the dishonesty of a clerk, had, in reply to the written inquiry as to "the checks which would be used to secure the accuracy of the clerk's accounts, and how often they would be closed," answered in writing that the ac-

<sup>1</sup> Before Lord Mansfield's time representations were usually oral. *Pawson v. Watson*, Cowp. 785.

<sup>2</sup> *Hodgson v. Richardson*, 1 W. Blackst. 463; 3 Burr. 1477.

<sup>3</sup> *Reid v. Harvey*, 4 Dow, Parl. Cas. 97. See also *infra*, No. 550; *Vandenhoevel v. United Ins. Co.* 2 Johns. Cas. N. Y. 451, and same plaintiff *v. Church*,

2 id. 173, n.; *Steel v. Lacy*, 3 Taunt. 285; *Kemble v. Browne*, 1 Caines, N. Y. 75; *Kirby v. Smith*, 1 Barnew. & Ald. 672.

<sup>4</sup> *Stewart v. Morrison*, Millar, Ins. 59.

<sup>5</sup> *Simmes v. Marine Ins. Co.* 2 Cranch, C. C. 618.

counts were "examined every fortnight." It was stipulated that any fraudulent statement should render the policy void. Losses had accrued by the clerk's embezzlements at divers times, and the underwriters objected to the later ones on the ground of a non-compliance with the warranty, as they alleged it to be, that the accounts should be examined periodically. Pollock, C. J., of the English Exchequer Chamber, said the statement was "a declaration of the course the office intended to pursue, and if made *bonâ fide* it did not prejudice the assured's right to recover."<sup>1</sup> This seems, however, to be a promissory representation.<sup>2</sup>

In a case before the Supreme Court of Connecticut the policy on a factory provided that "the survey and description should be part of the policy and a warranty." The court treated the statements in the application respecting the watch kept in the building, and hours of working, as representations.<sup>3</sup>

A refusal to warrant property to be neutral is considered to be an implied representation that it may be belligerent,<sup>4</sup> and that the insurers were to take that risk.

The questions whether, and in what cases, written statements or implications in the policy or in documents therein referred to, are representations or warranties or mere descriptions of the subject, and to what effect and how construed, and whether a substantial compliance is sufficient, or a strict one is necessary, are considered under other heads.<sup>5</sup>

528. So *where the first insurer*, having a secret understanding with the assured, that he is not to be bound by his subscription, *is merely a "decoy,"* this deception is equivalent to an express misrepresentation to the other insurers, who will accordingly not

<sup>1</sup> Benham v. The United Guaranty and Life Ins. Co. 7 Exch. 744, 14 Eng. L. & Eq. 524.

<sup>2</sup> See *infra*, No. 939, and the case appears also to have been open to the defence that the later embezzlements occurred through the negligence of the assured.

<sup>3</sup> Glendale Wollen Co. v. Protection Ins. Co. 21 Conn. 19. See also Daniels v. Hudson R. Ins. Co. 12 Cush. Mass.

416; Sheldon v. Hartford F. Ins. Co. 22 Conn. 235; Hartford Ins. Co. v. Harmer, 2 Ohio St. 452.

<sup>4</sup> So stated by Kent, C. J., Seton v. Low, 1 Johns. Cas. N. Y. 1, referring probably to Nonnen v. Kettlewell, 16 East, 176.

<sup>5</sup> *Supra*, No. 430; *infra*, No. 553, 569, 575, 592, 600, 640, 641, 652, 673, 674, 871, 872, 892.

be bound by their subscriptions,<sup>1</sup> such exhibit being an implied representation that the first subscription is *bonâ fide*.

529. *A misrepresentation is a false representation of a material fact, by one of the parties to the other, tending directly to induce the other to enter into the contract, or to do so on terms less favorable to himself, when he otherwise might not do so, or might demand terms more favorable to himself.*<sup>2</sup>

530. Though the fact misrepresented by the assured is on a matter concerning which he is not required to make any representation, still, if it tends directly to induce the underwriter to subscribe to the policy, when he otherwise might not do so, or to induce him to underwrite at a lower premium than he otherwise might do, it is a misrepresentation :

As where the assured in Edinburgh represented that eight guineas was the highest premium he had paid to London underwriters on the same risk, when he had, in fact, paid fifteen.<sup>3</sup>

531. *Concealment in insurance is where, in reference to a negotiation therefor, one party suppresses, or neglects to communicate to the other, a material fact, which, if communicated, would tend directly to prevent the other from entering into the contract, or to induce him to demand terms more favorable to himself; and which is known, or presumed to be so, to the party not disclosing it, and is not known, or presumed to be so, to the other.*

532. *It is of no importance that the circumstances misrepresented or concealed, or to which the misrepresentation or concealment relates, prove actually not to affect the risk.*

533. The question of misrepresentation or concealment usually has reference to the assured, for the reason that the facts are usually known to him, and the insurance is made mostly or wholly upon his statements. The doctrine is, however, equally applicable to the insurer :

As where an underwriter insures a vessel which he knows to have arrived.<sup>4</sup>

<sup>1</sup> Wittingham v. Thornborough, 2 Vern. 206; Prec. in Chan. 20; Wilson v. Duckett, 3 Burr. 1361.

<sup>2</sup> Thompson v. Buchanan, 4 Brown, Parl. Cas. 482; Mil. 79; Fitzherbert v. Mather, 1 Term, 12; Curell v. Mississippi Mar. & Fire Ins. Co. 9 La. 163.

<sup>3</sup> Sibbald v. Hill, 2 Dow, Parl. Cas. 263, differently decided in Scotland.

<sup>4</sup> Carter v. Boehm, 3 Burr. 1905; Duffell v. Wilson, 1 Campb. 401. See also Astley v. Ray, 2 Taunt. 214.



534. *The principle upon which the doctrine on this subject rests, is common to insurance and other contracts, namely, that where a party is led into a contract by misapprehension, and through error, occasioned by fraud or a culpable act or neglect for which the other is responsible, he is equitably entitled to be discharged from it. The doctrine has, however, a more extensive application in insurance than in most other contracts, on account of the fact just mentioned, that it is made upon the statements of the assured, who is, therefore, under stringent obligation to make a fair disclosure of the circumstances. Hence insurance is characterized by some of the oldest writers upon it as preëminently a contract of good faith, — “uberrimæ fidei.”*<sup>1</sup>

535. *The doctrines of misrepresentation and concealment are common to marine, fire, and life policies.*

536. *A representation to an agent of the underwriters for receiving applications, will be such to the underwriters:*<sup>2</sup> So to any authorized officer of the company.<sup>3</sup>

537. The effect of a misrepresentation or concealment, in rendering the contract inoperative, will be particularly considered in a subsequent section.

It is sufficient to state here, that generally, *if either party, whether purposely or through negligence, mistake, inadvertence, or oversight, misrepresents a fact which he is bound to represent truly, or omits to communicate a fact which he is bound to communicate, the other is wholly or partially exonerated from the contract.*<sup>4</sup>

*The effect of a misrepresentation or concealment, in discharging the underwriters, does not seem to be merely on the ground of fraud, as has been usually laid down by writers on insurance,*<sup>5</sup> *but also on the ground of a condition implied by the fact of enter-*

<sup>1</sup> McLanahan v. Universal Ins. Co. Neptune Ins. Co. v. Robinson, 11 Gill & J. Md. 256; Sawyer v. Coasters' Ins. Co. 6 Gray, Mass. 221; and see cases passim.

<sup>2</sup> McEwen v. Montgomery Mut. Ins. Co. 5 Hill, N. Y. 101.

<sup>3</sup> Potter v. Ontario & L. Ins. Co. 5 Hill, N. Y. 147.

<sup>4</sup> Curson v. Smith, and Cole v. Marine Ins. Co. Wharton, Dig. tit. Insurance, No. 28, p. 320; Dennison v. Thomaston Mut. Ins. Co. 20 Me. 125;

<sup>5</sup> Marshall, Ins. book 1, c. 9, s. 1; Park, 8th ed. 4011; Hughes, 345; Ann. 124; Evans, 58, 64; and see 2 Duer, Ins. 747, &c. where this point is learnedly and elaborately investigated.

ing into the contract, that there is no misrepresentation or concealment.<sup>1</sup>

Mr. Duer<sup>2</sup> criticizes the phraseology of the books, in putting the effect of a misrepresentation or concealment upon the contract entirely upon the ground of "fraud." Mr. Arnould<sup>3</sup> adheres to this application of that term, for the sake of consistency with the general legal doctrine, that what passes between the parties preliminary to a contract is not a part of it, and should not be imported into it. And since a representation through mistake or inadvertence has the same effect, in reference to the underwriter, as an intentional and literally fraudulent misrepresentation or concealment, — namely, it induces him to enter into a contract which he would otherwise have declined, or to take a less premium than he would otherwise have demanded, — he deems it to be excusable to apply the term "fraud," and thus bring the doctrine on this subject nominally within the acknowledged general principle applicable to other contracts.

But I cannot think that this anomalous use of the term is justifiable on this ground, since ambiguous phraseology is not to be tolerated in any science, and least of all in that of law, where it can possibly be avoided, as it may easily be in this case, by stating the practical doctrine in direct terms; namely, that it is an implied condition of the contract of insurance, that it is free from misrepresentation or concealment, whether fraudulent or through mistake. This implied condition involves no more difficulty than that of seaworthiness, or any other implied warranty. And if insurance is thereby distinguished from other contracts, which I apprehend it is not entirely, this peculiarity is not, that I can perceive, of great weight, certainly not enough to excuse an anomalous application of the technical terms "fraud" and "fraudulent" to many of the misrepresentations and concealments whereby a policy of insurance has been held to be defeated.

The doctrine on the subject is so evidently one of implied stipulation, that Mr. Arnould, notwithstanding his objection, himself puts it upon that ground. Speaking of promissory representations, he says, "They are positive engagements that certain

<sup>1</sup> See chap. 8, Implied Warranties.

<sup>2</sup> 2 Duer, Mar. Ins. 647.

<sup>3</sup> 1 Arnould, Ins. 495-498, part 2, c. 1, s. 2, No. 187.

material facts shall, or will, exist," and that they "involve a stipulation that, unless facts take place substantially corresponding with those specified, the underwriter shall not be liable on the policy."<sup>1</sup> How is there such an "engagement" or "stipulation," unless it is implied in the policy? And if it is, then the forfeiture of the insurance by misrepresentation or concealment is a forfeiture by a breach of a condition of the contract. So it seems to have been considered by Chancellor Kent.<sup>2</sup>

538. *Intelligence and rumored facts are equally material to be represented, and a suppression or misrepresentation of them will equally defeat the contract, though it turns out that they were erroneous, and that there did not really exist any circumstance tending directly to determine the insurer to decline the risk or demand a higher premium.*<sup>3</sup>

If the assured states that "according to the account he has received, a life proposed to be insured is a good one," the policy will not be defeated, though it is not a good life, if he has received such an account and has no information or knowledge to the contrary; but if he has received no such account the policy is void.<sup>4</sup>

539. *Neither an immaterial misstatement by a party, unless made in reply to a specific inquiry, nor a concealment of an immaterial fact, will impair the contract, unless it is intended fraudulently, and influences the other party.*<sup>5</sup>

540. *Though an immaterial misrepresentation or concealment is fraudulently intended by one party, it will not impair the contract, if it has no influence upon the other,*<sup>6</sup> although in such case the presumption *primâ facie* may be that it has in fact, as it is

<sup>1</sup> Arnould, Ins. 507.

<sup>2</sup> 3 Kent, Comm. 5th ed. 282.

<sup>3</sup> Lynch v. Hamilton, 3 Taunt. 37.

<sup>4</sup> Stackpool v. Simond, Marshall, Ins. book 3, c. 2, p. 772, 2d ed.

<sup>5</sup> Waldon v. N. Y. Firemen's Ins. Co. 12 Johns. N. Y. 128; Snyder v. Farmers' Ins. and Loan Co. 13 Wend. N. Y. 92; Farmers' Ins. Co. v. Snyder, 16 Wend. N. Y. 481; Coulon v. Bowne, 1 Caines, N. Y. 288; Lexington Ins. Co. v. Paver, 16 Ohio 324; Wall v. Howard Ins. Co. 14 Barb. N. Y. 383; White-

hurst v. Fayetteville Ins. Co. 6 Jones, Law, No. C. 352; Boggs v. America Ins. Co. 30 Mo. 63; Boardman v. New Hampshire Ins. Co. 20 N. H. 551. In Pennsylvania it was held that the clause "clerk sleeps in the building," in the policy copied from the application, was mere description and immaterial. Frisbie v. Fayette Ins. Co. 27 Penn. St. 325.

<sup>6</sup> See Morgan v. Bliss, 2 Mass. 111; Otis v. Raymond, 3 Conn. 413; Anderson v. Burnett, 4 Miss. 165; Salem India Rubber Co. v. Adams, 23 Pick.

intended to have, an influence in inducing the other party to enter into the contract, the presumption cannot be conclusive, and preclude evidence and inference to the contrary.

541. *If an underwriter is led into the contract by false statements and pretences of the assured or his agent, fraudulently made, with intent to deceive and which actually do deceive him, he will not be bound by the contract, whether the pretences have any direct tendency to induce too favorable an estimate of the risk or not.*

The question in such case is not the materiality or immateriality of the fact represented in regard to the degree of risk and proper rate of premium, but its effect in fraudulent deception in any respect.<sup>1</sup> This is a general principle of law applicable to insurance and other contracts, in reference to which the respective characters and capacities of the parties, and their relative position, are to be taken into consideration.

542. *A misrepresentation or concealment by one party of a fact specifically inquired about by the other, though not material, will have the same effect in exonerating the latter from the contract, as if the fact had been material, since by making such inquiry he implies that he considers it to be so.*

In all the jurisprudence this distinction is recognized. It is particularly applicable to written answers to written inquiries, referred to in the policy. The rule is so because a party, in making a contract, has a right to the advantage of his own judgment of what is material, and if, by making specific inquiry, he implies that he considers a fact to be so, the other party is bound by it as such.<sup>2</sup>

Thus where, in a fire insurance, it is inquired what buildings are within a certain distance from the one proposed, the applicant is bound substantially according to the fact, and is not at liberty to dispute its materiality.<sup>3</sup>

Mass. 256; Baker v. Carey, 19 Pick. Mass. 496.

<sup>1</sup> Marshall, 452; Park, 8th ed. 405; 3 Kent, Comm. 5th ed. 283; 2 Duer, Mar. Ins. 685; 1 Arnould, Mar. Ins. 500. The proposition is stated in a different form by the authors here referred to, but the doctrine stated in the text

is what I understand to be intended. See Valton v. National Ass. Co. 20 N. Y. 32.

<sup>2</sup> Dennison v. Thomaston Mut. Fire Ins. Co. 20 Me. 125; Wilson v. Conway F. Ins. Co. 4 R. I. 141.

<sup>3</sup> Burritt v. Saratoga county Mut. Fire Ins. Co. 5 Hill, N. Y. 188.



543. *A misrepresentation or concealment by the agent for effecting the insurance will defeat it, though not known to the assured, and though without any fraudulent intent on the part of the agent, to the same effect as if made by the assured himself.*<sup>1</sup>

544. *In general a substantial compliance with a representation is sufficient.*<sup>2</sup> *Where a written representation is expressly referred to in the policy, so as to be made a part of it, and purports to be a stipulation, it must be complied with according to its purport.*<sup>3</sup>

Promissory representations of material facts so made and referred to in the policy, usually have the effect of express warranties, and come under that head.

545. *Though it is not requisite that a representation should be in writing, it is usually so made, or is reduced to writing by the consent of the parties at the time of its being made, and it is for the mutual benefit of the parties that it should be in writing, as it induces caution and deliberation, and saves the parties from the forgetfulness and mistakes of witnesses, and the errors of brokers and clerks.*<sup>4</sup>

546. *A material misstatement by the assured through misconception of his information, is a misrepresentation; and the unwittingly omitting to state a material fact is a concealment.*

An insurance was made in England on a vessel from New York to Philadelphia, and from a misconception of the captain's letter, as was contended in behalf of the assured, it was represented that the vessel "was seen safe in the Delaware on the 11th of December," when she had been lost on the 9th, by running upon a chevaux-de-frise. Lord Mansfield said, "A representation must be true, and if the assured represents facts without knowing the truth, he takes the risk upon himself."<sup>5</sup>

<sup>1</sup> *Carpenter v. American Ins. Co.* 1 Stor. C. C. 57; *Fitzherbert v. Mather*, 1 Term, 12; and see cases generally.

<sup>2</sup> Vide infra, s. 2.

<sup>3</sup> *Houghton v. Manufacturers' Mut. Fire Ins. Co.* 8 Metc. Mass. 114; *Daniels v. Hudson R. Ins. Co.* 12 Cush. Mass. 416; and see section below, and c. 1, s. 8, No. 70.

<sup>4</sup> See *Pawson v. Watson*, Cowp. 785.

<sup>5</sup> *Macdowall v. Fraser*, Dougl. 247. See also *Fiske v. N. E. Mar. Ins. Co.* 15 Pick. Mass. 310; *Hazard's Adm'r v. N. E. Mar. Ins. Co.* 8 Pet. 557; *N. Y. Bowery Fire Ins. Co. v. N. Y. Ins. Co.* 17 Wend. N. Y. 359; *Shirley v. Wilkinson*, 1 Dougl. 306, n.; 3 Dougl. 41.

An insurance from Newport in Rhode Island, to Passage, in Spain, was made upon goods which had been brought from Lagaira, without being unloaded in the United States, so as to constitute an importation, and this circumstance was not made known to the underwriters. The goods, being captured, were condemned on the ground that it was an entire voyage from a Spanish colony to Spain. Mr. Justice Washington said, "The omission to communicate the circumstance of the not unloading the cargo, if material to the risk, whether by fraud or accident, vacated the policy. The underwriter takes the risk, under the condition that he shall be informed as to all facts within the private knowledge of the assured."<sup>1</sup>

547. *A representation being once made in reference to a proposed insurance, continues to be binding unless it is subsequently revoked or modified before the policy is executed.*<sup>2</sup>

548. *If the assured purposely and fraudulently neglects to learn material facts, it is a concealment of the same.*<sup>3</sup>

549. *Whether the master's fraudulently withholding information of material facts from the assured or broker, for the purpose of allowing opportunity to effect insurance, is a concealment imputable to the assured?*

In case of a policy in England on oats from Hartland in Devonshire to Portsmouth, the person who shipped the oats wrote on the same day to the agent of the assured in Portsmouth, advising him of the shipment, and that the ship had sailed, but he was afraid that the wind would force her back. He wrote on the same day to the same effect to another agent of the assured in London, saying, "I wish the whole were safe to hand. The weather appears stormy." Before the mail left Hartland with the letters, the writer learned, in time to have sent advice by the same post, that the ship was wrecked; but he sent no advice of the shipwreck. On the receipt of his letters in London, insurance was made, the letters being submitted to the underwriters.

<sup>1</sup> Kohne v. Ins. Co. of North America, 1 Wash. C. C. 93, 1 Wash. C. C. 158.

<sup>2</sup> Edwards v. Footner, 1 Campb. 530; where Lord Ellenborough comments upon the previous case of Dawson v.

Atty, 7 East, 367, in which he says the first representation was afterwards qualified and corrected. See also Marshall, Ins. 352.

<sup>3</sup> Biays v. Union Ins. Co. 1 Wash. C. C. 506.

Lord Mansfield and his associates adjudged the policy to be void;<sup>1</sup> thus imputing the concealment to the assured.

The same doctrine is recognized by Lord Ellenborough and his associates. A ship was insured in London "at and from Jamaica," where she lay at the date of the last intelligence from the captain, who omitted to mention, in his letter to the owner, that she had struck upon a rock in Machineal and been got off, without appearing to have sustained material damage. This circumstance was not known to the assured when he effected the policy, and accordingly was not communicated to the insurers. There does not appear to have been any fraudulent purpose on the part of the captain. Lord Ellenborough remarked, in giving the opinion of the court against the claim for a loss, that "what is known to the agent is impliedly known to the principal."<sup>2</sup>

A parallel case has been decided in favor of the validity of the policy by the Circuit and Supreme Courts of the United States. On the 9th of February, a policy was made in Boston, on a sloop and goods on board, lost or not lost, beginning the risk on the 12th of the preceding January, the sloop having been wrecked and totally lost on Cape Hatteras on the 19th of January. The master had in the mean time purposely neglected to advise his owner, at Newport, of the loss, and taken measures to prevent information from reaching him through other channels, for the express purpose of giving him an opportunity to make insurance, as he did, without having information of the loss. Judge Story, in the Circuit Court, assumed that the neglect of the master to give information was "wilful, and with a fraudulent design to enable the owner to make insurance after the total loss," and that "it was the duty of the master to give information of the loss,"<sup>3</sup> and ruled in favor of the claim for the loss.

Mr. Justice Thompson, giving the opinion of the Supreme Court, took the positions that, in order to defeat the policy, the concealment must be by the assured or some agent of his, whose agency had some connection with the business of procuring the insurance, and that as the master, as such, had no such agency, his concealment could not be imputed to the owner. He further put the decision upon the ground, that, if the master was agent of

<sup>1</sup> *Fitzherbert v. Mather*, 1 Term, 12.      <sup>3</sup> *Ruggles v. General Interest Ins.*

<sup>2</sup> *Gladstone v. King*, 1 Maule & S. 35.      Co. 4 Mas. C. C. 74.

either party, he was such of the underwriters, after a total loss for which abandonment had been made, as it had been in this case.<sup>1</sup>

Upon this last ground the underwriters will be answerable if the loss admits of abandonment, and not so if it is a partial loss, which is anomalous and clearly contradictory and inadmissible. As to the other ground, that the acts of the master in relation to effecting insurance are not imputable to the owner, Mr. Duer<sup>2</sup> remarks, that, if the master's fraud is to affect one of two parties, it ought to be the one who trusted him, namely, the owner.

But it is not merely a case where one of two parties must be prejudiced by the fraud of a third. The real question is, whether one party shall be defrauded and the other shall be entitled to the proceeds of the fraud, for the assured could not suffer by the master doing his duty in communicating information of the loss; he could only, at the most, be prevented from profiting by the master's fraud in concealing it. It is as if two by-standers bet upon a player who is proved to have cheated.

The contract is made under a misapprehension of both parties, namely, that a disaster at so short a distance, where communication is so frequent, must have been heard of within twenty-one days.

Again, there is no difference in principle between this case, where the master fraudulently conceals a fact, and one in which he should fraudulently state a fact, for the express purpose of enabling the owner to insure. Suppose, after a total loss, the master should write to his owner that he is pursuing the voyage prosperously, one does not easily persuade himself that a policy made under such a fraudulent imposition can be valid.

I accordingly cannot but conclude, that *a policy made, as the case supposes, under an essential misunderstanding by both of the parties, into which they are purposely and fraudulently led by a third, whether he be agent of one or both, or neither, is void.*

550. *A representation is construed according to the fair and obvious import of words, and is equivalent to an express statement of all the inferences naturally and necessarily arising from it.*<sup>3</sup>

A representation by a resident in a neutral country, that the

<sup>1</sup> General Interest Ins. Co. v. Rugles, 12 Wheat. 408.

<sup>3</sup> Per Marshall, C. J., *Livingston v. Maryland Ins. Co.* 7 Cranch, 506.

<sup>2</sup> 2 Duer. Mar. Ins. 420.



goods are his own, has been held to be a representation that they are neutral property,<sup>1</sup> and equivalent to a warranty of their being so.<sup>2</sup>

A representation that the ship is American is in effect a representation that it will be documented as such.<sup>3</sup>

It being stated by the broker to the underwriter that the ship insured was at Guadaloupe on the 28th of July, when the risk was to commence, the court said, "When it is stated that she was at Guadaloupe on a certain day, it must mean that she was there in safety, and that no preceding accident was to be made good by the insurers." <sup>4</sup>

Mr. Justice Bayley, speaking of a representation that the ship was "at Elsineur on the 26th of July, all well," said, "The natural conclusion would be that she was left there well at that time;" and this was the construction of the representation adopted by the court. In this sense it was false, for the vessel had sailed from that port on the 26th of July, six hours before the assured himself had sailed from the same port in another vessel, which had experienced rough weather and had a long passage.<sup>5</sup>

So a representation that the vessel "on the 2d of October was on the coast of Africa," authorized the construction that it was then left there, and, as the assured had intelligence that she sailed on that day, the insurers were discharged on the ground of misrepresentation.<sup>6</sup>

Where a policy was at and from Saffi, on the coast of Africa, to Lisbon, the assured communicated to the underwriters intelligence of the vessel having arrived at Maderia, and this was held to be notice to them that the commencement of the risk was to be postponed until she could arrive at Saffi.<sup>7</sup>

The applicants for a policy indorsed on their written application as follows: "Although our advices give us no reason to

<sup>1</sup> *Vandenheuvel v. United Ins. Co.* 2 Johns. Cas. N. Y. 451.

<sup>2</sup> *Vandenheuvel v. Church*, 2 Johns. Cas. N. Y. 127; 3 *id.* 486.

<sup>3</sup> *Steel v. Lacy*, 3 Taunt. 285.

<sup>4</sup> *Kemble v. Bowne*, 1 Caines, N. Y. 75.

<sup>5</sup> *Kirby v. Smith*, 1 Barnew. & Ald. 672.

<sup>6</sup> *Radcliff v. Shoolbred*, 1 Park, Ins. 8th ed. 413; *Marshall, Ins.* 468; recited 2 Duer, Ins. 507.

<sup>7</sup> *Driscoll v. Passmore*, 1 Bos. & P. 200.

believe there will be any articles contraband of war on board, still, as we wish to be covered against all possible risk, we request your consideration of the application including articles contraband of war." This was construed by the Maryland Court of Appeals not to be an implied representation of neutrality, as there was no assertion of any fact. It was implied merely that the vessel might be American, and might possibly have contraband articles on board. The plain import was, not that they assumed additional responsibility or made any new assurances or guarantees, but merely wished to obtain more full indemnity.<sup>1</sup>

551. *The statement of an expectation, opinion, or belief*, is not a representation of what is stated to be intended or expected, or believed as a matter of fact to be made good by the assured, and *will not affect the contract*, though the fact prove otherwise, *if the statement is made honestly*, and not fraudulently with intent to deceive the underwriter and draw him into a contract which he might otherwise decline :

As a "belief" that a life proposed for insurance is in good health : <sup>2</sup>

Or a statement that the vessel "intends to sail in September or October next," and did not sail until December : <sup>3</sup>

Or "is to sail in five days," though it did not sail so soon : <sup>4</sup>

Or was "expected to leave the coast of Africa" for the East Indies "in November or December," and had left in May : <sup>5</sup>

Or "was taking in paving-stones for ballast, and will fill up with hay," and a full load of paving-stones was taken, which was not so safe a cargo for the voyage : <sup>6</sup>

Or was expected to sail on a certain day, and did not sail on that day : <sup>7</sup>

Or "was expected to sail on the 24th," and had sailed on the 12th of the same month : <sup>8</sup>

Or was "to go to Madeira, the Isle of France, Pondicherry,

<sup>1</sup> Maryland Ins. Co. and Phoenix Ins. Co. v. Bathurst, 5 Gill & J. Md. 159.

<sup>2</sup> Pawson v. Watson, Cowp. 785.

<sup>3</sup> Bize v. Fletcher, 1 Dougl. 271.

<sup>4</sup> Whitney v. Haven, 13 Mass. 172.

<sup>5</sup> Barber v. Fletcher, 1 Dougl. 305.

<sup>6</sup> Bryant v. Ocean Ins. Co. 22 Pick. Mass. 200.

<sup>7</sup> Stewart v. Morrison, Millar, Ins. 59.

<sup>8</sup> Rice v. N. E. Mar. Ins. Co. 4 Pick. Mass. 439.

China, the Isles of France, and L'Orient," and China was omitted, and, instead, the vessel went to Bengal, touching at divers ports all within the limits of the voyage described in the policy.<sup>1</sup> The risk of the voyage from Pondicherry to Bengal was greater, and the premium higher by one per cent. than to China, and the voyage was extended beyond the usual length. Lord Mansfield said, "If no fraud was intended, and the real intention, at the time of making the representation, was to go to China," the insurance was valid.

So, where the broker said the vessel was American, but "he was directed not to warrant any thing," it was held not to be a representation.<sup>2</sup>

In case of the insurer's proposing to have a warranty introduced, that the ship should sail from St. Petersburg before the 1st of August, and the broker said, "There is no occasion for that; the ship has sailed some time, and must now be at Gothenburg; there is a cargo ready for her, and she is sure to be an early ship," — and the ship had arrived at Gothenburg before the 13th of June, when this conversation took place, but was detained there, waiting for a cargo, until after the 8th of September, Lord Ellenborough said: "I find no representation here upon the falsity of which the underwriters can defend themselves. The broker said, in unqualified terms, that a cargo was ready; but this, from its very nature, was only the subject of expectation and belief. All the broker could be understood to mean was, that a cargo had been ordered, and that there was every reason to suppose it would be ready."<sup>3</sup>

The consignee of goods insured from Lisbon to London had received a letter from the owner and consignor, dated October 27th, 1807, saying the goods would be sent by a Portuguese ship, which "would sail in a few days." This letter was not shown to the underwriters, but the broker told them, "that the ship was to sail in a few days." It appeared by the broker's testimony, that, if it had been represented that the ship would not sail within a month, insurance could not have been effected, as the French army was expected at Lisbon. The ship did not

<sup>1</sup> Bize v. Fletcher, 1 Dougl. 271

<sup>3</sup> Hubbard v. Glover, 3 Campb.

<sup>2</sup> Christie v. Secretan, 8 Term, 313.

sail until the 29th of November, and was the next day stopped in the Tagus by the French. Lord Ellenborough said: "The owner of the goods could speak of the sailing of the vessel only from probable expectation, and if such representation was made *bonâ fide*, it should not conclude him." The other judges were of the same opinion.<sup>1</sup>

At the time of effecting a policy on a ship at and from Messina to England, the broker had represented that the ship "was then at or near Messina, or on her homeward voyage." Mr. Justice Gibbs said: "It was only a conclusion which he drew, and if there was reason to doubt the truth of the conclusion, the underwriter should have inquired into the ground of that expectation."<sup>2</sup>

Where the person applying for a policy, in behalf of the assured, on a certain description of furs, gives, as a reason why the insurance should be low, that the articles come under the exception of particular average; it is held in New York, that this is not a representation of a fact, but merely an opinion on the construction of the memorandum, and that the contract is not affected by it.<sup>3</sup>

552. *The represented belief, intention, or expectation, may be that of the assured or his agent, or some third party, and may have reference to a fact or event expected or believed by some one at a distance from the negotiating parties, and at a previous time, or it may be of what it is expected or believed will occur at some time posterior to the date of the policy.*

In either case, the question may arise whether the material fact or event is absolutely declared and vouched for by the assured, or a mere expectation or belief of it is asserted. In either case the representation is of a fact, and a material one, but in one case it is that of an event or circumstance directly affecting the risk, in the other it is the fact of an expectation or belief of such event or circumstance.

All the cases agree that the statement of an expectation or belief of a fact is very different from an absolute assertion of it.

<sup>1</sup> Bowden v. Vaughan, 10 East, 415.

<sup>3</sup> Astor v. Union Ins. Co. 7 Cow. N. Y. 202.

<sup>2</sup> Brine v. Featherstone, 4 Taunt. 869.



But the cases do not agree as to what phraseology amounts to one or the other of these different representations. It is true that under different circumstances the same language may have different imports. The time referred to, whether present, past, or future, — the place, whether near or distant, — the party speaking, whether the assured or his agent, or a third person, — the voyage or adventure referred to, — the subject-matter, whether within the knowledge and belonging to the business and experience of the party making the statement or otherwise, — and the relative position of the parties negotiating, — all these circumstances and others may have a bearing, and need to be taken into account, in putting one or the other construction upon the representation. It will not necessarily follow, therefore, that two different constructions of precisely the same language, in different cases, are inconsistent with each other.

It would, therefore, be unprofitable to go into a critical discussion of the opposite interpretations put upon apparently similar, or literally identical phraseology, in different cases, since the opposite constructions may both be right, and whether they are so or not will be of very inconsiderable importance in determining, in other cases, that a representation is an opinion, belief, or expectation of a fact, or a positive asseveration or promise of it, and in which sense the underwriters were authorized to understand it.

553. *Whether the assured is bound by a promissory representation?*

This inquiry relates to a statement made otherwise than in the policy, as is usually understood by the term "representation." The general doctrine relative to the written contract of insurance, as well as other written contracts, as already stated,<sup>1</sup> is that it may be explained, but its provisions cannot be superseded, or independent additional ones introduced, by oral or written communications that took place between the parties in their preliminary negotiation. But fraudulent communications are universally excepted; these are at common law a ground of annulling contracts thereby obtained. Equity, which is a part

<sup>1</sup> *Supra*, c. 1, §§ 8 and 13.

of the "law," though not of the "common law," goes further, and either corrects and reforms written or other contracts, made in some respects or wholly through mistake, or annuls them. As marine insurance belongs to commercial jurisprudence, into which the principals of the civil law and equitable jurisprudence are largely infused, the implied reservation as to mistake has been very liberally construed, as we see through the whole of this subject of representation and concealment, and also occasionally under other heads. The same principle has been extended to the other species of insurance.

The principle is, that neither party shall be permitted to take advantage of his own knowledge and the other's ignorance of material facts, or his own forgetfulness of such facts, which he was bound to have remembered, or his own ignorance of such facts, which he was equitably bound to have known, to the prejudice of the other. The nature of the contract, and the usual position of the parties in relation to its subject-matter, render this principle fundamental. A question has, however, arisen concerning its application to an oral or written statement as to the future.

The fact of effecting the policy is, as we shall more fully see hereafter, an implied stipulation by the assured for the verity of his statements relative and material to the risk; and if they relate to existing or past circumstances, there is no question that he must be answerable for their truth under this implied condition. The question is, whether a statement relative to a future fact stands on a different footing. The question is very much mixed up with that of a representation of an expectation or belief, as will be seen in the cases cited under those heads, in which the courts occasionally imply or assert<sup>1</sup> that such a representation has not the effect of a stipulation for the future, and to give it such effect it must be a part of the policy.

The question can have relation only to a representation honestly made, for it is admitted on all hands that the holding out of any expectation, or the making of any promise of material future facts with the intent fraudulently to induce, and thereby inducing, the insurer to sign a contract, will render it void.

<sup>1</sup> See *Bryant v. Ocean Ins. Co.* 22 Pick. Mass. 200.

A Scotch case involving this question came up to the British House of Lords, upon a policy underwritten at Glasgow, on the 18th of June, on the ship B. and cargo, from Nassau, in New Providence, to the Clyde. The correspondents of the assured at Nassau wrote to them, "The B. will sail on the 1st of May." She in fact sailed on the 23d of April, for the purpose of taking advantage of convoy, and was captured by an American privateer on the 11th of May. The case turned upon the question, whether it was a representation of an expectation, or an undertaking for the sailing. And it was contended that, as there was no *mala fides*, the policy ought not to be affected by the mistake as to the time when the ship would sail. Lord Chancellor Eldon, giving his opinion in the House of Lords, said: "In case of such a misrepresentation, *mala fides* is not necessary to render the contract inoperative." He considered a statement of a fact, to be verified in future, to be no less binding than one relative to an existing or past fact.<sup>1</sup> The judgment was in conformity to his opinion confirming that of the Scotch Court of Appeals.

The construction of the representation is apparently in direct opposition to that put upon an equivalent phraseology under apparently precisely similar circumstances. But we pass over the question whether the underwriters were authorized to understand this to be a positive undertaking of a particular day, instead of an expression of an expectation merely, for whatever the construction might be in this case, it would have little or no authority in any other, as before suggested. We will also pass over the question of fact, whether the sailing on that particular day was material, this being a question for the jury in the particular case. Lord Eldon assumes that it must have been material, in order that a non-compliance with it should render the contract inoperative.

The doctrine of this case, then, to our present purpose, and a doctrine well founded and sanctioned by a preponderating weight of authority, is, that *a positive, affirmative representation of material facts in respect to the future is, in effect, a stipulation that they shall be substantially as stated, and that a non-fulfilment of such a*

<sup>1</sup> *Dennistown v. Lillie*, 3 Bligh, 202.

*representation will defeat the policy*, if it occurs prior to, or simultaneously with, the commencement of the risk, or be a ground of forfeiture, if afterwards:<sup>1</sup>

As where the assured in a fire policy stated that a stove was to be substituted for an open fireplace:<sup>2</sup>

And, also, where the assured, in a marine policy, stated that the goods insured would be carried in the master's chest as his own.<sup>3</sup>

Mr. Duer<sup>4</sup> supports the doctrine that a promissory representation is obligatory, as being in effect a stipulation for the future, and he makes references to authorities directly<sup>5</sup> or impliedly<sup>6</sup> in favor of that doctrine.

In a Massachusetts case, a fire policy on a factory and its contents provided for its being void unless the assured had made "a just, true, and full exposition of the facts and circumstances, so far as known to him and material." If we add, "and not known to the insurer," it is precisely what is implied in every policy, and was so construed by the court. It was held, that the assured was bound by his written statements, not as warranties, but as representations, which would be satisfied if they were substantially made good. Two of these statements in reply to questions were as follows: "Water casks are placed in each room." "The mill is examined thirty minutes after work." The assured was held to be bound for a continued substantial compliance with these representations, during the period of the policy. In other words, the representation in connection with the condition expressed in this policy, and implied in all policies, amounted to a binding stipulation for the future, which must be substantially complied with.<sup>7</sup>

<sup>1</sup> See on this point, *Kimball v. Aetna Ins. Co.* 9 All. Mass. 540.

<sup>2</sup> *Alston v. Mechanics' Mut. Ins. Co.* 1 Hill, N. Y. 510, which was, however, reversed in the Court of Errors, on the ground taken by Mr. Chancellor Walworth, that such a statement, not being inserted or referred to in the policy, did not bind the assured. 4 Hill, N. Y. 329.

<sup>3</sup> *Himely v. Stewart.* 1 Brev. No. C. 209.

In *Flinn v. Tobin*, 1 Mood. & M. 367, Lord Tenterden seems to be of opinion that a non-fulfilment of a promissory representation will defeat the policy only in case of fraud.

<sup>4</sup> 2 Duer, *Mar. Ins.* 657.

<sup>5</sup> *Marshall, Ins.* p. 450, b. 1, c. 10, s. 1.

<sup>6</sup> *Rice v. N. E. Marine Ins. Co.* 4 Pick. Mass. 439.

<sup>7</sup> *Houghton v. Manufacturers' Mut. Fire Ins. Co.* 8 Metc. Mass. 114; *Supra*, No. 66.



So, under a decision of the Supreme Court of the United States, if it is represented that "no lamps are used in the picking-room" of a factory, the policy will be forfeited by using them there.<sup>1</sup>

It is singular that this question respecting a promissory representation being obligatory should ever have been raised, since administrative jurisprudence abounds with instances of the deliberate recognition of the obligation imposed by such a representation, particularly those of a future time of sailing. Representations relative to neutral ownership and insignia, and those of the occupancy of buildings under fire policies, have been invariably held to relate to the whole period of the risk. The representation is construed to be of the existing facts, and also of the continuance of them, as far as this depends on the assured.<sup>2</sup>

*554. Whether a representation to the first or to an intermediate underwriter of a series of underwriters on the same policy, is constructively such to the subsequent ones, so far as they could avail of it in discharging themselves from the contract?*

Lord Mansfield said it had been determined in divers cases that a representation to the first underwriter extends to all the others.<sup>3</sup> The principle on which this rule rests is, that, in offering to a party a policy subscribed by another, the insured implies a proposal that the party to whom it is offered shall enter into the same contract which that other has entered into whose name is already upon it, unless such presumption is rebutted by what passes between the parties to the subsequent signature; and the contract will not be the same if there are certain conditions between the parties to the prior subscription which do not form a part of the contract between those to the subsequent one.

The rule is usually stated generally, that a representation to the first underwriter is such to the others. But wherever it is

<sup>1</sup> *Clark v. Manufacturers' Ins. Co.* 8 How. 235.

<sup>2</sup> *Williams v. N. E. Mut. Fire Ins. Co.* 31 Me. 219; *Underhill v. Agawam Mut. Fire Ins. Co.* 6 Cush. Mass. 440; *Sillem v. Thornton*, 3 Ell. & B. 868, 26 Eng. L. & Eq. 238. See *infra*, No. 638. *Benham v. United Guarantee Co.* 7

Exch. 744, 14 Eng. L. & Eq. 524, cited *supra*, No. 527, seems not to be in accordance with the current of authorities.

<sup>3</sup> *Barber v. Fletcher*, Dougl. 305. See also *Pawson v. Watson*, Cowp. 785; *Stackpool v. Simon, Park*, (8th ed.) 932; *Marshall, Ins.* 772; *Feise v. Par-kinson*, 4 Taunt. 640.

referred to, the meaning evidently is, that the subsequent subscribers may avail of the rule in defence against a claim on the policy, not that the assured can avail of it to charge them, which would be absurd. The rule is accordingly stated above, with that qualification. Lord Ellenborough says, the rule is to be received with great qualification, and intimates something similar to the one above made.<sup>1</sup> The rule was held, in South Carolina, not to avail against the subsequent subscriber.<sup>2</sup>

It has been held that a representation to the first signer of the slip, who was not the first to the policy, did not extend to the others. It was so held in England because the slip, not being stamped, could not be given in evidence for the purpose of transposing the order of the names as in the policy.<sup>3</sup> But independently of this technical difficulty, the case plainly comes within the principle of the rule respecting the subscribers to the policy itself.

The rule has been strictly limited to representations to the first subscription.<sup>4</sup>

The result of the jurisprudence then is, that *the subsequent subscribers may avail themselves of a misrepresentation to the first in defence against a claim on the policy.*

*Jurisprudence has expressly excepted a misrepresentation to a prior intermediate subscriber, but I venture to dissent from that exception to the rule as above qualified, since there is precisely the same implied representation by the assured in respect of any prior intermediate subscriber, as in respect of the first one.*

555. *A representation affects only the contract to the making of which it has reference :*

As in case of statements made to an insurance company to induce it to consent to another insurance of the subject being made by another company.<sup>5</sup>

Where an application for insurance was rejected and a subsequent one accepted, and a policy issued to the same party on the

<sup>1</sup> Forrester v. Pigou, 1 Maule & S. 9. Carstairs, 2 Campb. 543; Forrester v.

<sup>2</sup> Himely v. South Carolina Ins. Co. Pigou, 1 Maule & S. 13; Per Sir James

<sup>3</sup> 1 Const. So. C. 154. Mansfield, C. J., Brine v. Featherstone,

<sup>4</sup> Marsden v. Reid, 3 East, 572; Bell 4 Taunt. 869.

<sup>5</sup> v. Carstairs, 2 Campb. 544. Williams v. N. E. Mut. Fire Ins.

<sup>6</sup> Per Lord Ellenborough, Bell v. Co. 30 Me. 219.

same subject and risks, the policy was held by Mr. Justice Woodbury not to be affected by the representation made on the first application.<sup>1</sup> Still less will a representation to insurers in one policy, affect another subscribed by different underwriters on the same subject.<sup>2</sup>

556. *Whether facts known to one director or officer of a company are presumed to be known to the company?*

In a case in South Carolina, the court took the position, in respect to a policy underwritten by an incorporated company, that facts known to one of the directors are not to be presumed to be known to the others, that is, to the company.<sup>3</sup>

*This must, however, depend upon the agency and authority of the director* in regard to the taking of the risk, for usually one officer acts for the company in communicating with the assured, and facts known to him are presumed to be so to the company, so far as such knowledge is necessary to the validity of the insurance.

## SECTION II. TO WHAT TIME THE DOCTRINE OF REPRESENTATION REFERS.

557. *The assured is responsible for whatever he has represented concerning and material to the risk, and in reference to a policy thereupon issued, whether the representation is made at the time of effecting it or previously.*

558. *The representation may be of facts as existing at the time, or past, or may have reference to the future.*

559. *In determining whether there has been any concealment or misrepresentation, reference is had to the time of making the policy, or, where the parties are at a distance from each other, to the latest opportunity of communication to the insurers by the most expeditious of the usual modes. The representation must be sufficient in reference to that time,<sup>4</sup> and the rule is the same in*

<sup>1</sup> Nicoll v. American Ins. Co. 3 Woodb. & M. C. C. 529.

<sup>2</sup> Elting v. Scott, 2 Johns. N. Y. 157.

<sup>3</sup> Himely v. South Carolina Ins. Co. 1 Const. So. C. 154.

<sup>4</sup> Freeland v. Glover, 6 Esp. 14; 7 East, 457; Edwards v. Footner, 1 Campb. 530; Himely v. Stewart, 1 Brev. So. C. 209; Byrnes v. Alexander, 1 id. 213; and see cases generally.

respect to facts known to the agent for negotiating the policy, as to those known to his principal.<sup>1</sup> The time referred to is that of the effective execution of the policy. Where, through mistake of the agent of the assured, the policy was at first made upon the vessel, instead of the cargo, and, on discovery of the error, a new execution of the policy, or what was equivalent, was requisite, the obligation as to representation was held to refer to the latter and only effective execution.<sup>2</sup>

560. In respect of representation and concealment, *intelligence received, and known to the clerks of the assured, at his counting-room, or place of business, which is frequented by him at the time, is presumed to be known to him.*<sup>3</sup>

### SECTION III. REVOCATION OF THE ORDER.

561. *If intelligence of a fact enhancing the risk, or of a loss, is received after an order has been given for insurance, and before the contract is executed, it must be communicated to the underwriters with due diligence, or the order countermanded.*<sup>4</sup>

The party who has given the order is not required to send by express to countermand it, unless that is the usual mode. It will be sufficient to send by the usual conveyance.<sup>5</sup>

One of the owners of a New Bedford ship, being in New York, had written to the other, at New Bedford, to make insurance. His instructions were sent by a vessel in the morning. In the afternoon of the same day, news was received at New York of the loss of the vessel. Had he, on receipt of this intelligence, immediately sent by the steamboat to Newport, and thence by mail to New Bedford, countermanding the order, the countermand would have been received at New Bedford before

<sup>1</sup> Fitzherbert v. Mather, 1 Term, 12;  
McLanahan v. Universal Ins. Co. 1 Pet.  
170.

<sup>2</sup> Sawtell v. Loudon, 5 Taunt. 359;  
1 Marsh. 99.

<sup>3</sup> Himely v. Stewart, 1 Brev. So.  
C. 209; Byrnes v. Alexander, 1 id.  
213.

<sup>4</sup> Watson v. Delafield, 2 Caines, N.  
Y. 224; 1 Johns. N. Y. 150; 2 id.  
526.

<sup>5</sup> See Byrnes v. Alexander, 1 Brev.  
So. C. 213; Grieve v. Young, Millar,  
Ins. 65.



the policy was made; but if he had sent by mail, it would not have been received until after the policy was made. The jury were instructed, that it is sufficient, in such case, to send by the usual conveyance; and it appeared that this was, at the time, the mail by land.<sup>1</sup>

“The only matter of observation,” says Mr. Justice Story, “is, whether certain cases require extreme diligence, where the countermand may not only probably, but possibly arrive, in season. We think, however, that the rule requires only due and reasonable diligence. The expressions thrown out in the cases intimate that there might be cases in which a very prompt effort for communication might be fairly deemed but due and reasonable diligence; as where the loss takes place very near the port at which the insurance is to be made, and the means of communication, by mail and otherwise, are regular or numerous; or where, from the lapse of time, and the date of the order for insurance, the party cannot but feel that every moment’s delay adds many chances in favor of the insurance being made before knowledge of the loss.”<sup>2</sup>

#### SECTION IV. REPRESENTATION OR CONCEALMENT BY AN AGENT.

562. *A representation or concealment by an agent for effecting the insurance or making a representation, is that of the principal, and has the same effect on the policy as if made by the principal.*<sup>3</sup>

In this case, as in all others involving the responsibility of the principal for the acts of his agent, the latter must be such for the particular purpose, by previous appointment, or by the adoption of his acts or the recognition of his agency by the party interested.

563. *If the assured communicates bonâ fide to the insurers erroneous intelligence published in the newspapers, or obtained*

<sup>1</sup> *Green v. Merchants’ Ins. Co.* 10 Pick. Mass. 402. See also *Andrews v. Marine Ins. Co.* 9 Johns. N. Y. 32.

<sup>2</sup> *McLanahan v. Universal Ins. Co.* 1 Pet. 186.

<sup>3</sup> *Stewart v. Dunlop*, 4 Brown, Parl. Cas. 483, n.; *Park, Ins.* 320; *Russell v. Thornton*, 4 Hurlst. & N. Exch. 788, 6 id. 140. See *supra*, No. 526, 541, and cases *passim*.

from another person, who received it from his own correspondent, neither of them having any connection with the assured, and communicates such intelligence to the underwriters, *upon the faith of which a policy is made, and it turns out that the facts were quite different* from what the parties understood them to be, and wholly on the side of the enhancement of the risk, or even if a loss may have happened subsequently to the time when the risk is to have commenced, *still the insurance is valid.*

So, if the facts proved to be more favorable to the risk than the intelligence, still the assured cannot reclaim his premium, if the subject was within the specified risks.

In such case there is no mistake of the facts between the parties. Each has the same opportunity to make his own conclusions from the same intelligence, and takes upon himself the risk of a mistake in so doing.

564. A difficult question, giving rise to discordant decisions, has arisen where insurance has been made under a misapprehension of the facts by the assured, occasioned by a concealment or misrepresentation by the master of the vessel, or by some correspondent of the assured, who has no agency respecting the insurance, the doubt and point of discrepancy in the decisions being whether the master or correspondent, though not an agent of the assured for making the insurance, shall be considered to be such for communicating the information to him according to the usual course of business, of whose fraud or culpable gross negligence in this respect the assured ought not to be allowed to take advantage. And the doctrine already stated on this question<sup>1</sup> is, that *a policy effected through the fraudulent misrepresentation or concealment by the master of the vessel, or any habitual agent or correspondent or recognized representative of the assured, is not at the risk of the insurers.*

<sup>1</sup> Supra, No. 549, where are cited *Ruggles v. General Interest Ins. Co.* 4 *Gladstone v. King*, 1 *Maule & S.* 35; *Mas. C. C.* 74; and *General Interest Fitzherbert v. Mather*, 1 *Term*, 12; *Ins. Co. v. Ruggles*, 12 *Wheat.* 408.

## SECTION V. CONSTRUCTION OF A REPRESENTATION.

565. *The language of a representation, like that of a policy of insurance, is usually to be understood in its ordinary sense.*<sup>1</sup>

566. *A representation in a letter written at the place of the writer's residence, distant from that where a policy is applied for in his behalf, instructing his agent to effect insurance, and exhibited to the insurers by the agent, is to be construed according to the meaning of the phraseology in the place where the letter is written.*

It was so held by the Supreme Court of the United States respecting a statement by the assured, writing from New York to Boston for insurance on a vessel, that it was "coppered,"<sup>2</sup> reversing the decision of Mr. Justice Story in the Circuit Court, that the construction must be according to the meaning in Boston.<sup>3</sup>

The general doctrine is, that the language of a contract is to be construed according to the usage of the place where it is made.<sup>4</sup> The same general rule must apply to a letter or statement, written or oral, though the particular circumstances of a case may readily be imagined to be such as to make an exception. Had the letter been that of a third person, wholly independent of the parties, and understood by both the assured and insurers in a different sense from that intended by the writer, it would, if it went to the whole subject-matter of the contract, render it void, as being founded in mutual mistake, as stated by Mr. Justice Story in reference to the above case. But if it merely led the parties into a mistake respecting some subordinate, incidental matter, not being the substantive subject and basis of the contract, it would not defeat the contract, as we see in all the cases of erroneous intelligence acted upon by the parties to the policy. Such a misunderstanding is at the risk of either of the parties that may be affected by it. The question then is, whether a

<sup>1</sup> As to the influence of the connection and the ambiguity of the questions in construing representations, see *Wilson v. Hampden F. Ins. Co.* 4 R. I. 159.

<sup>2</sup> *Hazard's Adm'r v. N. E. Marine Ins. Co.* 8 Pet. 557.

<sup>3</sup> *Hazard v. N. E. Marine Ins. Co.* 1 Sumn. C. C. 218.

<sup>4</sup> *Supra*, No. 121.

similar misunderstanding arising on the letter so written by the assured himself, in good faith, shall be excepted from this rule. It does not appear upon what ground such an exception can be made.

567. *A representation imports not only what is expressed, but also all the natural and obvious inferences from it.*<sup>1</sup>

Thus a representation that a ship was at a place on a certain day, imports that she was there in safety.<sup>2</sup>

Representation that a building is occupied as a grist-mill, imports that it is not occupied for any other purpose enhancing such a risk.<sup>3</sup>

The rule may operate in favor of the assured, as well as against him, for the inference may be of a fact which he is bound to disclose.<sup>4</sup>

A representation that a vessel "is" at a certain distant place, means that it is so at the time of making the representation.<sup>5</sup>

After an application for insurance of a ship had been made, the applicants stated, "Although our advices give us no reason to believe that there will be any articles contraband of war on board the ship Budget, still we wish to be covered against all possible risks; we wish your reconsideration of the written application, including articles contraband of war." This was held not to be a representation or warranty that the ship was neutral property.<sup>6</sup>

The fact that the policy was on the freight of an American vessel from the Swedish island St. Thomas to Havana, was ruled by Mr. Justice Cranch, not to imply that the cargo was taken in at St. Thomas, and the policy was ruled not to be rendered void on account of the cargo having been taken aboard at Buenos Ayres, then in revolt from Spain, and at war.<sup>7</sup>

<sup>1</sup> *Ratcliff v. Shoolbred*, Marshall, Ins. 468; 1 Park, 8th ed. 413. But in Illinois a representation that there is a force-pump in a factory, is held not to include a hose. *Peoria Ins. Co. v. Lewis*, 18 Ill. 553.

<sup>2</sup> *Supra*, s. 1.

<sup>3</sup> *Jennings v. Chenango M. Ins. Co.* 2 Den. N. Y. 75.

<sup>4</sup> *Supra*, s. 1.

<sup>5</sup> *Callagan v. Atlantic Ins. Co.* 1 Edw. Ch. N. Y. 64.

<sup>6</sup> *Maryland & Phoenix Ins. Co. v. Bathurst*, 5 Gill & J. Md. 159.

<sup>7</sup> *Simmes v. Mar. Ins. Co.* 2 Cranch, C. C. 618.



An insurance effected by a common carrier on his interest as such in goods by a certain steamboat, does not imply that he is owner. It may be applied to goods carried in a boat chartered by him.<sup>1</sup>

A representation literally and grammatically having reference to the present state of things, is in many cases construed to imply a promissory undertaking to maintain the same or an equivalent state of things, so far as it shall depend upon the assured or his agents, during the continuance of the risk.<sup>2</sup>

568. *Where the representation is ambiguous or obscure, the construction will depend upon the obviousness of the ambiguity or obscurity. If there is no fraud on the part of the assured, and a fact is imperfectly represented, yet is so represented as to obviously suggest further inquiry on the part of the underwriter, the representation is sufficient;*<sup>3</sup> *but otherwise there is not obviously an ambiguity or obscurity.*

This follows necessarily from the fundamental doctrine of representation which requires of the assured to disclose material facts not known to the underwriter or presumed to be so. The doctrine is no less applicable in the case in question; he is equally bound to disclose an occasion for inquiry, before negligence in not making it can be imputed to the underwriter.<sup>4</sup>

569. *Discrimination is to be made whether the representation is of a certain fact or condition of things specified, or merely of a report or intelligence of such fact or condition of things.*

Thus, where the agent of the assured, at the time of making insurance, exhibited a letter from the assured, in which he said that the vessel "was said to sail uncommonly fast," Mr. Justice Story instructed the jury, that where a letter contained a representation of facts not known to the party writing it otherwise than by information derived from others, and so the letter states the facts, or it is a necessary inference from the nature of the facts themselves, the representation is not falsified by the mere proof that the facts are not so, if the party communicating the information did receive such information, and *bonâ fide* confided

<sup>1</sup> Chase v. Washington Ins. Co. of Cincinnati, 1 Barb. N. Y. 576.

<sup>2</sup> Supra, No. 553.

<sup>3</sup> Supra, No. 568; infra, No. 585.

<sup>4</sup> In Nicoll v. Am. Ins. Co. 3 Woodb. & M., C. C. 529, the rule is laid down somewhat more largely in favor of the assured.

in it. He undertakes then, not for the truth of the facts, but for his having been so informed.<sup>1</sup>

570. So the distinction is to be made, as we have already seen,<sup>2</sup> between an assertion of a fact, and a mere statement of opinion, belief, or expectation.

Accordingly, if the intelligence as to the time of sailing is truly represented, the policy will not be defeated, though it turns out to be erroneous, and both parties are acting under a mistake as to this fact. That is, the parties respectively take the risk of the time of sailing. In other words, they do not contract upon an implied condition that the vessel did in fact sail at the time supposed, but upon condition that the intelligence as to the time of sailing was truly represented.

A letter was exhibited to the insurers, from the captain of a vessel, R., at Kingston, in Jamaica, to the assured, saying, "I shall leave this on the 12th," which would have made the R. out of time. Another letter from the agent of the assured at Campo Bello, New Brunswick, requesting his correspondent in Boston to effect insurance, was exhibited, saying, the J. had arrived from Kingston, and that the master of the R. "expected to sail on the 12th;" and a third letter was exhibited from the same agent of the assured to the same correspondent, dated the following day, saying that the master of the J. informed him that the R. would not sail till four days after the J., which would bring the sailing of the R. to the 24th, so that she would not be out of time. A policy was thereupon written upon the cargo of the R., with the memorandum in the margin, "Expected to sail about the 24th." She had in fact sailed on the 12th. There was either a mistake by the master of the J. in stating that the R. was expected to sail in four days after himself, or in the agent of the assured in stating the information given him by the master of the J. Mr. Justice Story ruled that this was a misrepresentation, and whether innocent or not, did not vary the legal result.<sup>3</sup>

The plaintiff thereupon became nonsuit, and a new suit was brought upon the policy, in the Supreme Court of Massachusetts, where it was held to be valid. Parker, C. J., giving the opinion

<sup>1</sup> *Tidmarsh v. Washington Ins. Co.* 4 Mas. C. C. 439.

<sup>3</sup> *Baxter v. N. E. Marine Ins. Co.* 3 Mas. C. C. 96.

<sup>2</sup> *Supra*, s. 1, No. 552.

of that court, said: "If the information obtained from the master of the J. was truly and correctly represented to the president of the office, although the fact thus communicated was not true, there was no misrepresentation, for the assured or his agent is bound only to communicate all the information he has."<sup>1</sup>

SECTION VI. WHAT FACTS MUST IN GENERAL BE DISCLOSED, AND IN WHAT MANNER.

571. *The assured is not required to communicate to the underwriter facts which are presumed or proved to be known to those conversant with the trade, or that are in fact known to the latter, however they may have become so. He is required, as a preliminary step, to communicate to the underwriter all other material facts within his knowledge, or presumed to be so, or of which he is bound to be informed, that would directly tend to induce the underwriter not to subscribe the policy at all, or to demand a higher premium.*<sup>2</sup>

"The facts lie most commonly in the knowledge of the assured only, the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance to mislead the underwriter, and induce him to estimate the risk as if it did not exist. The keeping back such circumstance is a fraud, and although the suppression should happen through mistake, the policy is void, because the risk is different from that understood and intended to be run."

The assured, says Lord Mansfield, "need not mention what the underwriter knows, what way soever he came by that knowledge, or what he ought to know, or takes upon himself the knowledge of, or waives being informed of, or what lessens the risk agreed and understood to be run, or general topics of speculation,

<sup>1</sup> Rice v. N. E. Marine Ins. Co. 4 Pick. Mass. 439. See Everett v. Desborough, 5 Bingh. 503; Von Lindenau v. Desborough, 8 Barnw. & C. 586; Maynard v. Rhodes, 1 Carr. & P. 360; as to the assured's making himself responsible for the representations of third persons.

<sup>2</sup> See supra, s. 1, No. 524; Murgatroid v. Crawford, and other cases there cited; Money v. Union Ins. Co. 4 M'Cord, So. C. 511; Hoe v. Mason, Wash. Va. 107, in which latter case the underwriters knew that the insured vessel had a letter of marque.

or every cause which may occasion natural perils, as the difficulty of the voyage, kind of seasons, probability of hurricanes, earthquakes, &c., or every cause which may occasion political perils, from the rupture of states, from war, and the various operations of it, upon the probability of safety from the continuance or return of peace, or the imbecility of the enemy. If the insurance be on a private ship of war, from port to port, the underwriter needs not to be told of the secret enterprises it is destined upon. From the nature of the contract he waives this information. If he insures for three years, he needs not to be told any circumstance to show it may be over in two, or if he insures a voyage with liberty of deviation, he needs not to be told what tends to show there will be no deviation. Men argue differently from natural phenomena, and the means of information and judging are open to both; each professes to act on his own skill and sagacity. The rule is adapted to facts which are privately known to one party, and which the other is ignorant of, or has no reason to suspect.”<sup>1</sup>

This lucid and comprehensive compend of the doctrine of representation and concealment was made by that eminent judge and jurist, in reference to an insurance in England for one year against capture on property at Fort Marlborough, in Sumatra, effected for Carter, the governor. His agent in London, who negotiated for the policy, knew of a letter of the assured written the preceding year, at the same time with the order to him to get insurance, and received by the Directors of the East India Company in London, notifying to them that the French had that year a design of attacking the settlement, which they might revive, and that the fort was inadequately supplied, and could not be maintained against a European enemy. And the letter to the agent ordering the insurance was of the same import. Neither of these letters was disclosed to the underwriters.

The fort was captured by the French within the year, and with it the insured property; and in the suit for the loss, Lord Mansfield, giving the opinion of the court, remarked, that if any enterprise had been known by the governor to be actually on foot at the time of his writing, it would have varied the case; but no

<sup>1</sup> Carter v. Boehm, 3 Burr. 1905; 1 W. Blackst. 593.



such enterprise was then on foot, and the underwriter was bound to know that the governor could not consistently with his official duty disclose the weak condition of the fort, if it were weak; and that all the circumstances relative to a probability of an attack were more within the underwriter's means of knowledge than those of the governor.

As to the inferences to be drawn from the design of the preceding year, if there had been one, they were mere matter of speculation. He said, by way of illustration, if an assured on a ship knew that "two privateers were lying in her way, without mentioning the fact, it would be fraud; but if he knew that two had been there the year before, it would be no fraud not to mention it." The decision was accordingly in favor of the assured.<sup>1</sup>

Whether a policy be effected on a life, or a ship, or against fire, says Mr. Justice Bayley, "if a circumstance be not communicated, the question is whether it was material, not whether the assured believed that it was material."<sup>2</sup>

572. *The underwriter is under a corresponding obligation, mutatis mutandis.*

"Good faith," says Lord Mansfield, "forbids either party, by concealing what he knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary."<sup>3</sup>

573. *The assured needs to represent to the underwriter such facts only as relate to, and are material to, the risk insured against.*

Every policy leaves some perils and losses at the risk of the assured, and by some policies only a single risk, as that of capture, or fire, is insured against, and by the definition of a material fact,<sup>4</sup> it is one concerning the risks covered by the policy. But many circumstances affect both the risks insured against and others indiscriminately, and such must be disclosed not the less because they affect other risks than those covered by the policy.<sup>5</sup>

574. It has already been stated, that a mere matter of belief or expectation or opinion of the assured, not arising on any specific

<sup>1</sup> Carter v. Boehm, 3 Burr. 1905. See also Thompson v. Buchanan, 4 Brown, Parl. Cas. 482; Millar, Ins. 79.

<sup>2</sup> Von Lindenau v. Desborough, 3 Carr. & P. 353.

<sup>3</sup> Per Lord Mansfield, Carter v. Boehm, 3 Burr. 1905; S. C. 1 W. Blackst. 575.

<sup>4</sup> Supra, No. 551.

<sup>5</sup> See 2 Duer, Mar. Ins. 578.

material fact in his knowledge not known, or presumed not to be known to the underwriters, will not, although communicated to them, constitute a representation.<sup>1</sup> It follows that *the assured is not bound to disclose his mere belief, expectation, or opinion.*

Thus, where the agent for effecting the policy did not disclose a letter from the assured expressing a fear that the vessel was out of time, it was held not to affect the policy, if the assured had no specific information on the subject.<sup>2</sup>

575. Though *the assured* is not bound to communicate his own expectations and opinions and speculations upon facts, he *must communicate information* on which the underwriters may form their own expectations.

Where the owners of the *Rising Sun*, then at Riga, received a letter informing them "that the order lately received there, to send the papers of all vessels that should arrive at St. Petersburg, had produced a great sensation on account of the detention which it would occasion; that the *Rising Sun* must share the same fate, and that her papers had been sent to St. Petersburg;" and the broker did not show the letter to the underwriters, but stated that "the ship's papers were sent to St. Petersburg for examination;" Lord Ellenborough said to the jury, "The assured are only bound to communicate facts. The broker did communicate the fact of the ship's papers being sent to St. Petersburg for examination; he was not bound to communicate the sensations and apprehensions which this fact produced at Riga."<sup>3</sup>

Here was ground for an expectation or apprehension of the detention of the ship, and Lord Ellenborough ruled that such ground was sufficiently communicated, so that the underwriters had a fair opportunity to make their own inferences.

But many instances will occur in the illustrations supplied by jurisprudence, and subsequently stated, especially respecting information relative to the expectation of the time of sailing from a foreign port, where it is incumbent upon the assured to disclose the expectations and hopes and apprehensions of his agents or correspondents, or of the master of the vessel.

576. *It is sufficient if the assured discloses the condition of the*

<sup>1</sup> *Supra*, s. 1.

ton, Dig., Insurance, No. 22, p. 1319.

<sup>2</sup> *Klein v. Lancaster Ins. Co. Whar-* See also cases *supra*, No. 571.

<sup>3</sup> *Bell v. Bell*, 2 Campb. 479.

*ship at the date of his last intelligence, without giving an account of previous events.*

The assured had received intelligence that the natives on the coast of Africa had attacked the vessel, and killed the captain, and several of the crew, whereby, and in consequence of disease, the crew had been reduced from twenty to five; he afterwards received intelligence of the subsequent condition of the ship, and that there were nine men on board. He disclosed only the last intelligence to the insurers. Lord Ellenborough said: "You are not obliged to inform the underwriters of all by-gone calamities. If the underwriters were truly informed of all the circumstances known to the assured on his latest information, it is sufficient."<sup>1</sup>

So the court in New York, speaking of a risk at and from Guadaloupe, to commence on the 28th of July, said, "It cannot be material where the ship was prior to that day."<sup>2</sup>

*577. In case of a retrospective policy, the assured is bound to disclose intelligence of any extraordinary enhancement of the risk, not known, or reasonably presumed to be so, to the underwriter, whether it relates to the past or future risk.*

If the assured, knowing of a previous loss within the period of the risk, conceals it, the policy will be void for fraud; but in respect of prior losses, or to past circumstances tending to enhance the risk, that are not known to him, the doctrine is the same as in respect of the future.<sup>3</sup>

A question on this subject occurred under a policy written in New York, there having been a "violent storm" at Norfolk, eleven hours after the vessel sailed from that port, and the representation was, that "there had been blowing weather and severe storms on the coast after the vessel had sailed." A majority of the Supreme Court were of opinion that this was a concealment, because the particular storm had not been specified. Lewis, C. J., dissented,<sup>4</sup> and apparently with some reason;

<sup>1</sup> *Freeland v. Glover*, 6 Esp. 14; 7 East, 457; 3 Smith, 424. But see *Sutherland v. Pratt*, 11 Mees. & W. Exch. 296; 12 id. 16.

*Russell v. Thornton*, 4 Hurlst. & N. Exch. 788; 6 id. 140. <sup>4</sup> *Ely v. Hallett*, 2 Caines, N. Y. 57. See *Moses v. Delaware Ins. Co.* 1 Wash. C. C. 385.

<sup>2</sup> *Kemble v. Browne*, 1 Caines, N. Y. 75.

for the distinction made by the court was certainly very nice. The representation was sufficient at least to put the insurers on inquiry. All the judges agreed that a representation relative to the weather was necessary. The result of the trial shows the importance of a specific disclosure.

Where a vessel sailed from Boston, November 18th or 19th, on a voyage to Smyrna, and was not afterwards heard from, and a policy was effected at the same place on the 13th of March following, it was held not to be a concealment affecting the policy, that the assured did not mention there having been a storm at Boston on the 22d of November, that is, three or four days after the vessel sailed. Putnam, J., giving the opinion of the court: "The ship, on November 22d, may have been in pleasant weather, two or three hundred miles from Boston where the storm raged. It would have been a somewhat violent presumption to assume as a fact, that the ship encountered that storm."<sup>1</sup>

578. *The assured need not state that other underwriters had declined the risk,<sup>2</sup> or what were their apprehensions or opinions respecting it; and if he expresses his own opinion as to the rate at which they would underwrite, though he knows they would not underwrite at that rate, this is immaterial.*

The assured applied for a policy in Philadelphia, at a premium of fifteen per cent., saying, in their letter to their agent for this purpose, "We have no doubt but that we could get the insurance effected in New York at that premium." They had, in fact, applied in New York, and could not obtain insurance on the risk at any rate. It was taken at Philadelphia at twenty per cent. Mr. Justice Washington instructed the jury, that this was not a misrepresentation that defeated the assurance, because it purported to be merely an opinion, and because the underwriters must have known that it was not correct, since the assured would not have paid twenty per cent. in Philadelphia, if they could have effected a policy at fifteen per cent. in New York.<sup>3</sup>

<sup>1</sup> Fiske v. N. E. Marine Ins. Co. 15 Pick. Mass. 310. See Ely v. Hallett, 2 Caines, N. Y. 57.

<sup>2</sup> Ruggles v. General Interest Ins. Co. 4 Mas. C. C. 74.

<sup>3</sup> Clason and Dunham v. Smith, 3 Wash. C. C. 156.



579. *If the assured states as a fact, or distinctly implies, that other insurers have already underwritten the risk at a certain rate of premium, this is considered to be a representation, and the assured will be answerable for its correctness accordingly.*

Thus, where a broker in London wrote to underwriters in Scotland, that the assured "had done as much insurance as the underwriters in London were inclined to take at eight per cent.," and not any had been done in London at that rate, it was held to be a misrepresentation.<sup>1</sup>

580. *Where goods are insured from a certain port, this may be an implied representation of their being loaded on board there, whether it is so, will depend on the particular port, or the voyage or passage for which the insurance is made, and what nations are at war at the time, and upon the national character of the ship or cargo insured.*<sup>2</sup>

581. *If the order for insurance is sent by a special messenger, this must be disclosed, in case such is resorted to only on extraordinary emergencies between the same places, and a different, convenient, and reasonably expeditious mode of communication is ordinarily used.*

It was held in the French Court of Appeals, that where the order was frequently sent by express, its being so sent need not be disclosed.<sup>3</sup>

If the dates disclosed show plainly that the facts communicated must have come by express, the fact of the express need not be specifically stated.<sup>4</sup>

582. *It is not necessary to the validity of the insurance in the outset, that the assured should disclose his intention to enhance or vary the risk described in the policy, at some intermediate stage. Such an enhancement or change affects the policy, if at all, as a deviation, and not as a concealment.*

Such a case is parallel to a promissory representation, in which the underwriters are discharged from the time of the promise being broken; so in this case they are discharged from the time of the intention being put into execution.

<sup>1</sup> *Sibbald v. Hill*, 2 Dow, Parl. Cas. 263. that he does not own the vehicle. Supra, No. 567.

<sup>2</sup> *Infra*, No. 939. A carrier who insures his interest as such need not state

<sup>3</sup> *Pothier, Ins.* No. 12.

<sup>4</sup> *Court v. Martineau*, 3 Dougl. 161.

The case is also parallel to that of a non-compliance with an express or implied warranty at some intermediate stage of the voyage which is still the same that is described in the policy, whereby the insurers are temporarily or ultimately discharged from their liability. The case in question is, in fact, a violation of the warranty, implied by the fact of making the insurance, not unnecessarily to enhance or change the risk.

In the first place, the rights and liabilities of the parties to the policy must be correlative and reciprocal. If the assured is precluded from alleging a concealment as the ground of reclaiming the premium, as I presume he is, then, if there is no fraud on his part, he is certainly, as a matter of equity, no less than legal principle, to be entitled to the benefit of his contract until he forfeits it by some act, whatever may have been his intentions in the mean time.

Let the assured be himself master, and sail on what shall be considered to be the voyage described in the policy, with an intention in some stage to do what will be an enhancement or change of the risk, without fraud, and without being aware that he will thereby forfeit the policy, or with the intent to forfeit it or suspend the risk temporarily. Surely the underwriter has no right, after a loss, to interrogate him about such prior intention, which was not executed.

It is difficult to distinguish this case, in principle, from that of instructions to another as master, to the same effect. The two cases are substantially identical, where the voyage includes touching at divers intermediate ports, or is divided into stages at which the owner might have a chance to countermand his original instructions to the master.

This reason applies with still greater, not to say conclusive force, to a policy on the goods of another shipper than the owner of the ship.

In the often cited case before Lord Kenyon and his associates,<sup>1</sup> on a policy on goods by the *Arethusa*, from London to Jamaica, the master was ordered to take the northern route, from a certain point, and touch at Cape Nicola Mole, the southern route being the more usual, and the fact being proved or as-

<sup>1</sup> *Middlewood v. Blakes*, 7 Term, 162.

sumed in the case, that the election of the route from the place where it branches was usually left to the discretion of the captain, to be exercised on arriving at that place. The ship was captured on the northern route after having passed the dividing point. A special jury, in compliance with Lord Kenyon's ruling, found that the not disclosing of the order given to the captain was a "concealment." In deciding on a motion for a new trial, Lord Kenyon said, "The fact that the discretion of the captain was taken away ought to have been communicated to the underwriters." Ashhurst, J.: "Had the intention of going to St. Domingo been first communicated to the underwriters, perhaps they would not have subscribed." Grove, J.: "The circumstance" (namely, the order,) "should have been disclosed." Lawrence, J., assented to the decision of the other judges and the jury, but not to the grounds given for it. He said, if the capture had taken place before coming to the dividing point, the insurers would, in his opinion, have been liable for the loss, but were discharged on the ground of deviation, because the master did not in fact exercise his discretion in making an election of the northern route. That is, if he had used his own discretion at the dividing point in taking the northern route, as his order was, the insurers would have been liable for the loss.

The difference of the three judges from Lawrence, in the grounds of their respective opinions, is that they put their opinion upon the non-disclosure, he upon the captain's not in fact taking the northern route by preference. Each either says directly, or distinctly implies, that, if the capture had been made before passing the dividing point, the underwriters would have been liable for the loss.

This case, so far as it goes, concurs with the grounds stated in support of the proposition above laid down, of the correctness of which I should have more decided confidence, had not a different opinion been expressed by Judge Duer.<sup>1</sup>

583. We shall see hereafter, under the inquiry respecting the risks covered by a policy, that a party may be insured against the perils of an interloping trade, provided the underwriter has

<sup>1</sup> 2 Duer, Mar. Ins. 491, &c.

notice by the policy itself, or otherwise, that trade in contravention of foreign commercial regulations is intended.<sup>1</sup> Whence it follows conversely, that,

*If the voyage proposed for insurance is in contravention of a recent foreign trade-law known to the assured, or which he is bound to know, and not known or presumed from its publicity or otherwise to be to the underwriter, such intended contravention must be disclosed, or the underwriter will not be answerable for any loss consequent thereon.*

584. *Whether the fact that the vessel has a letter of marque must be disclosed?*

*Silence as to this fact will not defeat the policy, where there is no deviation or delay in consequence, except in case of a policy upon neutral goods. If the master intends to use the commission only on the defensive, and uses it only so, the insurers have nothing to complain of. If he is instructed to chase vessels, but sees none to chase, or disregards the instructions and keeps within the terms of the policy, it is then the case of instruction to enhance or change the risk, involving a question of deviation, rather than one of representation and concealment, and will recur under that head.<sup>2</sup>*

The doctrine just stated is inconsistent with a deliberate decision of Lord Kenyon and Mr. J. Grose.<sup>3</sup> But their opinion has been doubted,<sup>4</sup> and was reasserted with apparent hesitation by Lord Kenyon himself,<sup>5</sup> and is unsupported by analogy or precedent, and has not been subsequently recognized as law in any case that has come to my knowledge.

585. *Where a sufficient representation is made to put the underwriters upon inquiry for further information, if they wish for it, and they neglect to make such inquiry, they are bound by the policy.<sup>6</sup>*

<sup>1</sup> Emerigon, tom. 1, p. 684, c. 12, s. 51; Valin, tom. 2, p. 131; tit. Insurance, a. 49; Us et Cout. de la Mer, p. 3, a. 6, n. 1; and Parker v. Jones, 13 Mass. 173, and divers other cases cited in the chapter on risks to this point.

<sup>2</sup> And see supra, No. 582.

<sup>3</sup> Denison v. Modigliani, 5 Term, 580.

<sup>4</sup> 1 Marsh. 2d ed. p. 282, book 1, c. 7, s. 6.

<sup>5</sup> 6 Term, 382.

<sup>6</sup> Court v. Martineau, 3 Dougl. 161; Fort v. Lee, 3 Taunt. 381; Alsop v. Commercial Ins. Co. 1 Sumn. C. C.



586. *The assured must make true answers to the inquiries of the insurer, respecting circumstances affecting the risk.*<sup>1</sup>

Such inquiries may make it necessary that the assured should disclose facts respecting which he might otherwise be silent. Circumstances affecting the seaworthiness of the ship need not be disclosed in the first instance by the assured, but he must make a true representation of such facts in reply to the inquiries of the insurer :

As where the assured is inquired of as to the age of the ship, and the place where she was built.<sup>2</sup>

This principle is not limited to the subjects of implied warranties. Insurance being made for a voyage upon which the ship had already sailed, without a disclosure of this fact, the court said: "If the insurer wanted to know whether the ship had sailed, he ought to have inquired."<sup>3</sup> That is, an inquiry imposes the duty of representing a fact which otherwise need not be represented.

But a general inquiry as to seaworthiness does not require a statement of all the particular facts bearing upon it.<sup>4</sup>

586 a. *An oral representation is sufficient unless the policy or regulations and conditions referred to therein, require it to be in writing.*<sup>5</sup>

In marine policies oral representations have been considerably in use,<sup>6</sup> in other species of insurance they are usually required to be in writing.

587. *The rules in regard to representation apply as well to reinsurance as to original insurance,* and have a broader application in one respect, for the original assured is not bound to make any representation in relation to his own character; whereas, the party effecting reinsurance is bound to communicate facts within his knowledge in relation to the character of

451, and cases generally. The doctrine on this subject is more definitely stated under the head of construction. *Supra*, No. 568.

<sup>1</sup> *Infra*, No. 641.

<sup>2</sup> *Popleston v. Kitchen*, 3 Wash. C. C. 138.

<sup>3</sup> *Fort v. Lee*, 3 Taunt. 381.

<sup>4</sup> *Augusta, &c. Co. v. Abbott*, 12 Md. 348.

<sup>5</sup> *Masters v. Madison County Mut. Ins. Co.* 11 Barb. N. Y. 624.

<sup>6</sup> *Supra*, No. 527.

the original assured, material to the risk and tending to enhance the premium.<sup>1</sup>

587 a. *A bottomry or respondentia contract being an insurance by the lender, the doctrines in respect to representation and concealment seem to be no less applicable to it than to insurance in the more ordinary form.*

#### SECTION VII. SPECIES OF PROPERTY, AND NATURE OF THE INTEREST.

588. If the subject or insurable interest is so described that the policy is applicable to it, *the assured is, in general,*<sup>2</sup> *not required to disclose the particular nature and modifications of his interest.*

Where the assured is only part-owner, trustee, or mortgager or mortgagee of the ship and goods insured, or the charterer of the ship, with an agreement to pay for it if lost, and so in effect applies for reinsurance, or holds as administrator, it is not, in either of these cases, requisite that he should make known his qualified or partial interest.<sup>3</sup>

Nor is the owner of the ship bound to state that it is let by charter-party.<sup>4</sup>

589. *But if the national character of the subject is incorrectly represented, and it is material, the policy will be void :*

As where a ship represented to be American was owned by Spaniards.<sup>5</sup>

590. *Freight may be insured without disclosing that it is for only a part of a voyage.*<sup>6</sup>

591. *Where the property is of an unusual kind for the voyage,*

<sup>1</sup> N. Y. Bowery Fire Ins. Co. v. N. Y. Ins. Co. 17 Wend. N. Y. 359; Hartford Ins. Co. v. Harmer, 2 Ohio St. 452.

<sup>2</sup> See supra, c. 5, No. 416-424.

<sup>3</sup> Oliver v. Greene, 3 Mass. 133; Lawrence v. Van Horn, 1 Caines, N. Y. 276; Locke v. North American Ins. Co. 13 Mass. 61; Bartlett v. Walter, id. 267; Williams's Adm'r v. Cincinnati

Ins. Co. 1 Wright, Ohio, 542; Finney v. Warren Ins. Co. 1 Metc. Mass. 16; Holbrook v. American Ins. Co. 1 Curt. C. C. 193; Sussex Ins. Co. v. Woodruff, 2 Dutch. N. J. 541; Bidwell v. North Western Ins. Co. 24 N. Y. 302.

<sup>4</sup> Hodgson v. Miss. Ins. Co. 2 La. 341.

<sup>5</sup> Price v. Depeau, 1 Brev. So. C. 452.

<sup>6</sup> Taylor v. Wilson, 15 East, 324.

or the situation or use in contemplation of the parties, *and subject to extraordinary risk*, by reason of its species or nature, and the underwriter cannot be presumed to expect that the policy might be intended by the assured to cover such a subject, *the insurance of it under a general description*, such as "property," "merchandise," or the like, *will not be valid unless the kind of property is represented*:

As in case of the property being live animals.<sup>1</sup>

592. *The materiality of the kind of title or interest of the assured may depend upon the stipulations and conditions of the policy.*

Where a fire insurance company had a lien for premium on the real estate upon which the insured building stood, an insurance upon it by him as his own, when he only had a bond for a deed, was held not to be binding upon the underwriters.<sup>2</sup>

In a Pennsylvania case, Gibson, C. J., and his associates consider the statement of an incumbrance or prior lien to be material, and the omission to represent it to be a concealment, upon the ground that on payment of a total loss the underwriters are entitled to the cession of the insured interest, whether that of owner or mortgagee.<sup>3</sup> But in this case, as in marine insurance,<sup>4</sup> the loss may be adjusted by deducting the value of the salvage. The omission does not therefore seem to be material and to amount to a concealment, unless some inquiry or some representation made, or some provision or implication in the policy, renders the disclosure material, as in the case before cited of a lien for premium.

#### SECTION VIII. USAGES OF THE TRADE NEED NOT BE DISCLOSED.

593. The underwriter is presumed to know *the usages* of the particular trade insured,<sup>5</sup> and these, accordingly, *need not to be represented* to them by the assured.

<sup>1</sup> *Allegre's Adm'rs v. Maryland Ins. Co.* 2 Gill & J. Md. 136. See *Wolcott v. Eagle Ins. Co.* 4 Pick. Mass. 429; *Chesapeake Ins. Co. v. Allegre's Adm'rs*, 2 Gill & J. Md. 164.

See also *Pinkham v. Morang*, 40 Me. 587.

<sup>3</sup> *Smith v. Columbia Ins. Co.* 17 Penn. St. 253.

<sup>4</sup> *Infra*, No. 1716.

<sup>2</sup> *Brown v. Williams*, 28 Me. 252.

<sup>5</sup> *Maryland and Phoenix Ins. Co. v.*

Where it is customary on the voyage insured to take fictitious clearances, the taking such need not be disclosed.<sup>1</sup>

The underwriter is presumed to know *the local situation and circumstances of the ports comprehended within the voyage, and accordingly these need not to be represented.*

An insurance was made "from New York to port Sisal," and other ports. There is no harbor at Sisal, and vessels lie at anchor in an open roadstead while loading and unloading. The trade was recent at the time of making the insurance, and the fact that there was no harbor was not disclosed to the underwriters. Kent, C. J., said: "The assured was not bound to communicate to the underwriters his knowledge of Sisal. This was a matter of general notoriety, equally open to the knowledge of both parties, and which both must be presumed equally to know."<sup>2</sup>

In the case of an insurance on a ship from Oporto to London, a part of the cargo being taken on board within the bar of Oporto, the ship was removed over the bar to take in the remainder, as was usual in regard to ships of light burden, whence she was driven out to sea by a gale of wind, and captured. The insurers insisted that they should have been informed that a part of the cargo was to be taken in outside of the bar, but Lord Ellenborough ruled, that they "were bound of themselves to take notice of the usage."<sup>3</sup>

The same opinion, in effect, was given respecting a policy upon goods to a port in Jamaica, "till landed;" and it was usual, at the port of destination, to land the cargo in shallops from ships of the size of that which carried the goods insured. The court said, "The underwriter should inquire what is the usual mode of landing the goods."<sup>4</sup>

Where it is usual for vessels on the voyage insured to make an intermediate voyage, such intermediate voyage may be made without apprising the assurers that it is intended.

Such was formerly the practice in India voyages; the East India Company uniformly reserved, in the charter-party, the lib-

Bathurst, 5 Gill & J. Md. 159; and see supra, c. 1, s. 13, No. 133.

<sup>3</sup> Kingston v. Knibbs, 1 Campb. 508, n.

<sup>1</sup> Planché v. Fletcher, 1 Dougl. 238.

<sup>4</sup> Stewart v. Bell, 5 Barnw. & Ald.

<sup>2</sup> Delonguemere v. N. Y. Firemen's Ins. Co. 10 Johns. N. Y. 120.



erty of employing the vessel one year on intermediate voyages from port to port in India. A similar usage prevailed in Newfoundland voyages, and it was held, that the assured was not bound to state this to the underwriters. Lord Ellenborough said: "The underwriter must refer himself to the usage of the trade, which he is bound to know."<sup>1</sup> "Is it notorious that ships in this trade, upon their arrival at Newfoundland, are either employed in 'banking,' or take an intermediate voyage? If so, it must be presumed to be equally in the knowledge of both parties."<sup>2</sup>

A vessel being insured to Xibara, in the island of Cuba, the assured omitted to state that there were no pilots there. This was not a material concealment.<sup>3</sup>

A ship was represented to be "at Limerick." She was, by the intelligence on which the representation was made, at Grass Island, about nine miles below Limerick, but within the port of that place, and where vessels of the size of the one to which the representation related usually unload a part of their cargoes. It was held, that the representation was true.<sup>4</sup>

594. It seems to be the better opinion, that *a representation of an intention to vary from a usage of the particular voyage or risk, whether by sea or land, will justify the variation and countervail the evidence aliunde of the usage, provided the variation is not inconsistent with the explicit provisions of the policy.*

#### SECTION IX. EVASION OF FOREIGN COMMERCIAL AND MUNICIPAL REGULATIONS.

595. The doctrine has already been stated, that the subjects of one state are not bound to respect the commercial and municipal regulations of another.<sup>5</sup> Such regulations have often a material importance in determining the degree of risk, and accordingly the

<sup>1</sup> And see ruling of Lord Eldon, *Ougier v. Jennings*, 1 Campb. 505, n. Mart. La. n. s. 289. See also 2 Gill & J. Md. 164.

<sup>2</sup> *Vallance v. Dewar*, 1 Campb. 503.

<sup>4</sup> *Bell v. Marine Ins. Co.* 8 Serg. &

<sup>3</sup> *Neilson v. Louisiana Ins. Co.* 5 R. Penn. 98.

<sup>5</sup> *Supra*, c. 3, s. 2, No. 268.

question arises, how far the assured is bound to make a disclosure of such as bear upon the adventure.

Upon this subject it has been held, that, *where the trade is prohibited by the standing and uniform well-known regulations of a foreign country, it is not necessary to make any representation of the prohibition.*<sup>1</sup>

As in an insurance on goods from Havana to Carthagena, warranted American, when both places were in Spanish colonies.<sup>2</sup>

Nor is it necessary in such case to state that the vessel will carry simulated papers, and that the property will be disguised.<sup>3</sup>

In the case of a vessel engaged in a smuggling trade with the Spaniards on the Mississippi, Lord Mansfield said: "If the insurer had, with a full knowledge that it was a smuggling trade with Spain, made the insurance, then it might be a fair contract."<sup>4</sup>

596. *If the assured has intelligence of a new regulation, by which the property is exposed to seizure, he is bound to disclose it.*

An order having been given for insurance in London, on a vessel bound to Varel, on the Jade, a policy could not be effected on account of information of a recent decree of the French Emperor, ordering all vessels entering the Jade to be confiscated. The vessel was insured in the United States, without any disclosure by the assured of a letter informing him why insurance could not be effected in London. The court said: "The letter contained information very material in estimating the risk. The withholding it from the underwriter must be considered fraudulent, and the insurance was therefore void."<sup>5</sup>

597. *If a trade, not prohibited by standing regulations, is sometimes prohibited and sometimes permitted, the underwriter is not bound to take notice of its being prohibited at the time of making the policy. The existing prohibition, and the necessity of using false papers, must be disclosed.*<sup>6</sup>

598. *It is not necessary to inform the insurers, that, for the purpose of saving duties, the ship takes out a clearance for a port of destination different from that for which she in fact sails, unless the false clearance affects the risk materially.*

<sup>1</sup> Pollock v. Babcock, 6 Mass. 234.

<sup>4</sup> Lever v. Fletcher, Park, Ins. 360.

<sup>2</sup> Calbraith v. Gracie, 1 Wash. C. C.

<sup>5</sup> Hoyt v. Gilman, 8 Mass. 336.

219.

<sup>6</sup> Blagge v. New York Ins. Co. 1

<sup>3</sup> Livingston v. Maryland Ins. Co. 7 Cranch, 506.

Caines, N. Y. 549.

A vessel cleared at Honduras for Portsmouth, for the purpose of saving duties, though she sailed for New York, to which port she was insured. The omitting to disclose this fact did not affect the policy.<sup>1</sup>

599. *Where fictitious clearances are customary on the voyage insured, the underwriters are presumed to be acquainted with this custom, as they are with all other customs of trade.*

In case of a ship insured from London to Nantz, with liberty to touch at Ostend, for and from which port she took clearances, for the purpose of avoiding certain duties at Nantz, and without any intention of touching at Ostend, it was held, that the policy was not affected by the omission of the assured to state the false clearances, and the purpose of taking them, as it appeared that this was the usage of the trade, with which the insurers were presumed to be acquainted.<sup>2</sup>

#### SECTION X. MATTERS OF EXPRESS STIPULATION IN THE POLICY.

600. *It is not required of the assured to make a representation of any circumstance which is provided for by the express stipulations of the policy.*

In regard to subjects of the express provisions or statements of the policy, any other representation is of no avail, since it will be controlled by the policy itself.<sup>3</sup>

On a claim for a loss, it was objected, that a circumstance bearing upon the character of the property as neutral was not disclosed. Spencer, C. J., for the court: "If it be conceded that those circumstances did enhance the risk, the answer is decisive, that a party need not communicate any thing with respect to a fact in regard to which there is an express or implied warranty."<sup>4</sup>

A vessel being insured "to Kingston and a market, in Jamaica," the master was ordered, when off the east end of the island, if in

<sup>1</sup> Barnewall v. Church, 1 Caines, N. Y. 202. See Augusta, &c. Co. v. N. Y. 217. See also Talcot v. Marine Abbott, 12 Md. 348.  
Ins. Co. 2 Johns. N. Y. 130.

<sup>2</sup> Planché v. Fletcher, 1 Dougl. 238. Co. 20 Johns. N. Y. 214; confirmed,

<sup>3</sup> Astor v. Union Ins. Co. 7 Cow. N. Y. Firemen's Ins. Co. v. De Wolf, 2 Cow. N. Y. 56, in the Court of Errors.

season to fulfil a contract to deliver goods at Port Maria, to put in there; otherwise, to proceed to Kingston. The vessel put into Port Maria, accordingly, and returned towards the United States, without touching at Kingston, and was lost on her homeward voyage. It was held, that omitting to state these orders to the underwriters was not a material concealment, for the course of the voyage, and the ports at which the vessel might touch, must be determined by the description of the voyage in the policy.<sup>1</sup>

#### SECTION XI. MATTERS OF IMPLIED WARRANTY OR STIPULATION.

601. *Matters of implied agreement in the policy need not be represented by the assured in the first instance. But he is bound to make true answers to inquiries by the underwriters, relating to matters of implied warranty. And though no such inquiries are made, still, if the assured voluntarily make representations of this description, he will be bound thereby, and the policy will be void, unless they are substantially true.*<sup>2</sup>

It is an implied agreement on the part of the assured in every policy, whether on the ship, cargo, or freight, that the ship is seaworthy, and in every respect sufficient and well fitted for the voyage on which she is bound. The assured is not therefore required to state, in the first instance, any facts which only affect the seaworthiness of the ship.

The owner of goods, insured from Madeira to Charleston, had, the day before effecting the policy, received a letter from the captain, at Madeira, stating that "the ship was very leaky, and that ten pipes of wine had been half covered with water," of which he did not inform the underwriter, who, on that account, refused to pay a loss. Lord Mansfield told the jury, "that there should be a representation of every thing relating to the risk, except it be covered by a warranty. It is a condition or implied warranty in every policy, that the ship is seaworthy, and therefore there need be no representation of that."<sup>3</sup>

<sup>1</sup> *Houston v. N. E. Ins. Co.* 5 Pick. Mass. 89.

policy. *Bulkly v. Protection Ins. Co.* 2 Paine, C. C. 82.

<sup>2</sup> But an express misrepresentation on such a subject is held to avoid the

<sup>3</sup> *Shoolbred v. Nutt*, Park, 346; and see *De Wolf v. Firemen's Ins. Co.* 20



In case of insurance on a ship at and from Trinidad to London, the owners had received a letter from the captain, in the West Indies, stating that "the ship was in very good order, but that he had had a survey on her, on account of her bad character," of which they did not inform the underwriter. The jury found, that, if this letter had been disclosed, it would have varied the premium, even if the survey, which was very favorable to the character of the vessel, had been laid before the underwriter at the same time; for it was said by some of the witnesses, that surveys made in the West Indies were of very little authority.

Lord Ellenborough, giving the opinion of the court, said: "Is it then to be laid down as a principle, that every fact known to the assured, with respect to the condition, quality, and circumstances of the ship, prior to the period of effecting the insurance, which may possibly guide the judgment of the underwriter in undertaking or refusing to undertake the insurance, is to be communicated to him? It would certainly have some weight in guiding the judgment of an underwriter on such a subject, to know how old the ship was, where she was built, whether originally British or foreign, what was the form of her construction, whether clinker-built or not, whether copper-bottomed or not, what repairs she had received, and when and in what docks those repairs were done, and if the voyage were, as this was, a voyage home, what accidents the ship had met with in her outward voyage. All this may be very convenient and proper for the insurer to be informed of, and all this he may ask of the assured; and if the assured should withhold, upon being asked for it, any material part of such required information, his policy could not be sustained." It was held not to be a concealment.<sup>1</sup>

Under a policy on a vessel from Belfast, in Ireland, to Lisbon, and thence to New York, the assured had notice of a draft upon him by the master for expenses at Havana, where he put in, as he alleged, for water, on his prior passage from New Orleans to Belfast, which the owners had refused to pay, on the ground that the expenses were unnecessary. They had also been informed

Johns. N. Y. 214; 2 Cow. N. Y. 56; and see *Dennis v. Ludlow*, 2 Caines, supra, No. 600.

<sup>1</sup> *Haywood v. Rodgers*, 4 East, 590;

that the vessel had received damage at Cork, where it put in on the previous passage to Belfast, and the persons there acting as agents for the vessel had written, that they feared the captain "was careless of his business, and his amount of repairs and expenses would astonish them all." They had been informed that his detention there was very great, "yet he seemed very easy under it." The assured had also written to their Liverpool correspondent, that "the information confirmed their apprehensions as to Captain C.'s conduct." None of these circumstances were disclosed.

This was held, however, not to be a concealment, for the reason that the facts suppressed had reference to the seaworthiness of the vessel, which was warranted by the assured, and at their risk, and not at the risk of the underwriters.<sup>1</sup>

602. *If the assured, prior to effecting a policy, discloses a fact, or an intention to do any act, not inconsistent with the express provisions of the policy, but which, if not disclosed, would be a violation of a warranty implied by the fact of making the insurance, but not by the obvious and necessary construction of the language of the policy, the underwriters are bound by such representation, and the policy is valid notwithstanding such fact, or the execution of such intention, provided the case is free from illegality.*

This proposition is applicable to the representation of an intention to vary from a usage, a conformity to which is not explicitly requisite by the express provisions of the policy.

If the intention or fact is irreconcilable with the explicit terms of the policy, it is not the case now in question; but one, the rule applicable to which has been already laid down.<sup>2</sup>

The above proposition has not, that I am aware of, been explicitly engrafted into the English or American jurisprudence, and must therefore depend upon the reasons, analogies, implications, and inferences that can be brought to its support.

The difficulty of the question arises from the circumstance, that usages and implied warranties are part of the policy, and no principle of the law is more firmly established and more

<sup>1</sup> *Walden v. N. Y. Firemen's Ins. Co.* 12 Johns. N. Y. 128.

<sup>2</sup> *Supra*, No. 120.

decidedly fundamental, than the principle that a written contract cannot be superseded by words spoken. Oral testimony is admissible of what has been done in satisfaction of a written contract, but not what of it requires to be done. The whole proof must, in the first place, go to the construction of the writing; that is to say, it must go only to the intention of the parties thereby signified. Accordingly, since usages and implied warranties are said to be included in, and to constitute part of, the contract, the doubt is, whether preliminary and simultaneous collateral statements can be introduced by way of coming at the intention and mutual understanding of the parties.

We may, I think, lay it down as an axiom, if not as a corollary, on this subject, that, where the assured is bound by a representation, the underwriter is bound by notice of it. It is a fundamental principle in contracts, that we are to impute to each party a knowledge of what the contract requires of the other. Now we have already seen it to be incorporated into this branch of jurisprudence, that, though the assured is not bound to make any representation relative to the subject of any implied warranty, yet if he is inquired of, he must make true answers, or the policy will be void.<sup>1</sup> If he is bound by such representations, then, e converso, the underwriter is bound by notice of them when made. The contrary is a plain inconsistency.

Another rule of representation and concealment covers the case. The parties, as we have seen, are both subject to the rules relative to representation and concealment. When, therefore, the assured has stated a material fact, or an intention to do a material act not inconsistent with the provisions of the policy, a knowledge of this is as plainly imputable to the underwriter as that of usages and all the other facts which, as already said, he is bound to know.<sup>2</sup> By then proceeding and making the contract without any explicit provision as to such fact or purpose, and receiving the premium, he by the plainest implication concedes the fact or the execution of the intention. It is a plain fraud on his part subsequently to deny his assent.

The doctrine in question was expressly recognized by Lord Kenyon, and Ashhurst and Grove, Justices, and not disclaimed,

<sup>1</sup> Supra, No. 586, 600.

<sup>2</sup> Supra, s. 6, No. 571, and s. 8.

though not asserted, by Lawrence, J., in the case before stated, of the vessel being ordered to go by the northern route to Jamaica;<sup>1</sup> for the three first-named judges, following the ruling of Lord Kenyon to the jury, put the decision wholly upon the non-disclosure of the order. That is, in effect, saying that, if the assured had made known the order to take that route, the insurers would have been liable for the loss. In other words, the obligation by usage to leave the election of the route to the exercise of the captain's discretion at the dividing point, would have been superseded and cancelled by a disclosure of an intention to take away, or the fact that the ship-owner had taken away, that discretion.

I accordingly conclude that where there is no question of legality, or fraud, and the assured states a material fact touching either of the warranties of the commencement of the voyage within a reasonable time, the route or manner of prosecuting it, the seaworthiness of the ship, or of neutral character and of conduct, treated of in the next chapter, assuming that the warranty is implied merely by the fact of making the insurance, and not specifically by the phraseology of the policy, such implied warranty is subject to the representation.

SECTION XII. WHAT KINDS OF INTELLIGENCE MUST BE COMMUNICATED.

603. *The assured is not required to communicate to the underwriters intelligence known, or presumed from the circumstances, to be known to them, in whatever way they may have been informed.*

604. *The question whether intelligence is known to the insurers otherwise than from the assured, is for the jury.*<sup>2</sup>

As far as material facts are derived from newspapers and other channels of public intelligence, the question arises as to

<sup>1</sup> *Middlewood v. Blakes*, 7 Term, 8 Bingh. 198; *Green v. Merchants' Ins.* 162. Co. 10 Pick. Mass. 402; and see cases

<sup>2</sup> *Friere v. Woodhouse*, 1 Holt, 572; generally.

*Elton v. Larkins*, 5 Carr. & P. 86, 385;



what species of publication shall be presumed to be within the knowledge of the underwriter.

605. *Facts known at the office or place of business of either party to the policy, are primâ facie presumed to be known to him.*

It has been held in England, that intelligence posted up in the inner room of Lloyd's Coffee House is primâ facie presumed to be known to London underwriters who frequent that office.

At the time of insuring the ship *Lusitania* from the Brazils to Lisbon, it was communicated that she had been out fifty-seven days, but the assured did not inform the underwriters that the *Victorioso*, which sailed in company with his ship had arrived at Lisbon. This circumstance had however been published in the list of arrivals at Lloyd's, where the policy was effected. Burrough, J.: "The arrival of the other vessel must be presumed within the knowledge of the underwriters, from the circumstance of its being contained in Lloyd's printed lists." A special jury of merchants concurred in this opinion.<sup>1</sup>

But though the shipping-list at Lloyd's is primâ facie evidence of facts being known to the underwriters at that office, yet where the assured made a false representation of the time of a vessel's sailing, the underwriter was held not to be bound by the intelligence in the shipping-list to the effect of rendering the false representation immaterial.<sup>2</sup>

So, also, facts known to an officer of an insurance company having charge of its business, are presumed to be known to the company.<sup>3</sup>

606. *The insurers are not conclusively presumed to know all the marine intelligence published in the newspapers taken in their own office, or published in the place where it is kept.*

On the question whether information of the time of a vessel's sailing, given in the marine intelligence of a New York newspaper, taken at the office of an insurance company in New Bedford, might, from the evidence, have been rightly found by the jury to have been known to the president, Mr. C. J. Shaw,

<sup>1</sup> *Friere v. Woodhouse*, 1 Holt, 572.

See also *Elton v. Larkins*, 8 Bingh. 198,

5 Carr. & P. 86, 385.

<sup>2</sup> *Mackintosh v. Marshall*, 11 Mees. &

W. Exch. 116.

<sup>3</sup> *Himely v. South Carolina Ins. Co.*

1 So. C. 154. See same case *supra*.

said, in giving the opinion of the court against a new trial: "It may be very true that underwriters are not, under all circumstances, to be presumed to be acquainted with all the intelligence contained in the papers taken at their office. But the general presumption is, that the agents of the office will examine with some care those items of marine intelligence which are expressly designed speedily to diffuse information upon a subject so immediately interesting to them, especially in relation to vessels belonging to their own port."<sup>1</sup>

It having been admitted by the president of an insurance company, that he knew of the arrival of a certain vessel at a distant port, the arrival of which had been mentioned in the marine intelligence of a newspaper published at such port, and taken at the office of the company, this was held sufficient ground for admitting evidence of the news, brought by the vessel, of the time of sailing of another, published in the marine intelligence of the same newspaper, that the jury might infer that the president knew of the sailing of such vessel, there not appearing to be any other way of his being informed of the arrival of the vessel. If he had thus known of the time of sailing of the other vessel, this excused the assured from representing that fact.<sup>2</sup>

Insurance was made in New York on the "sloop Friendship, from Washington, in North Carolina, to Charleston, in South Carolina." A newspaper of the 19th of April, taken at the office of the insurers, contained intelligence that "a New York sloop, bound from Wilmington, in North Carolina, to Charleston, in South Carolina, had been stranded on Ocracoke Bar." On account of this intelligence, the risk was refused at one office on the 20th of April, and afterwards on the same day the assured applied for the policy in question, without disclosing this intelligence; and the policy was held to be void.<sup>3</sup>

607. *Intelligence by letter or report of cruisers hovering near must be communicated.*<sup>4</sup>

In effecting insurance, on the 24th of March, upon the priva-

<sup>1</sup> Green v. Merchants' Ins. Co. 10 Pick. Mass. 402.

<sup>3</sup> Dickenson v. Commercial Ins. Co. of N. Y. Anth. N. Y. 92.

<sup>2</sup> Green v. Merchants' Ins. Co. 10 Pick. Mass. 402.

<sup>4</sup> Beckwaite v. Nalgrove, 1 Holt, 288, n.; 3 Taunt. 41.

teer Hazard, from the 6th of that month, for two months, the broker omitted to disclose, that on the 8th and 9th of March there were reports in Jersey, whence the Hazard had sailed on the 6th, that some French frigates were about the coast; that a capture had been made on the 7th; and that on the latter day a ship's binnacle had been afloat on which was a compass of a particular construction. Gibbs, C. J., said: "Loose rumors, which have gathered together no one knows how, need not be communicated. In the present case the reports cannot be called loose." He thought they were such intelligence as ought to have been communicated.<sup>1</sup>

608. *A concealment of information or rumors material if true, will defeat the contract, though they turn out not to be true.*<sup>2</sup>

609. *The assured is bound to disclose intelligence, though of a doubtful nature, respecting facts material to the risk.*

The assured had an account that a ship described like his was taken; and he effected insurance without disclosing this intelligence. Lord Macclesfield said: "The assured has not dealt fairly; he ought to have disclosed what intelligence he had of the ship's being in danger, which might induce him to fear, at least, that it was lost." The policy was accordingly held to be void.<sup>3</sup>

Where the assured on the Aurora, of Hartford, had heard of the wreck of a vessel, the name of which as was reported to the person who saw the wreck, was the Debora, of Hartford, and they described the vessel to be of a different form from the Aurora; and the underwriters in New York had refused to underwrite the Aurora, on account of this news, and the assured obtained insurance in Boston without disclosing the intelligence, the policy was held to be void.<sup>4</sup>

610. *Intelligence may be of so general and indefinite a nature, and its application to the subject insured so doubtful and remote, that the assured need not communicate it, though it may possibly relate to the subject insured.*

The assured, who resided at Newport, Rhode Island, procured

<sup>1</sup> Durell v. Bederly, 1 Holt, 283.

<sup>2</sup> Lynch v. Hamilton, 3 Taunt. 37.

<sup>3</sup> Da Costa v. Scandret, 2 P. Will.

170; 2 Eq. Cas. Abr. 636, pl. 2.

<sup>4</sup> Burr v. Foster, S. J. C. of Mass.

Suff. June, 1799; Dane, Abr. Conceal-

ment.

insurance in Boston, on the 9th of February, 1824, on the sloop Harriet, "lost or not lost, from Newport, Rhode Island, to all ports and places to which she might proceed in the United States, for six months, beginning on the 12th of January, 1824, and \$600 on her cargo from Newport to Charleston or Savannah, or both." On the 12th of January the sloop had sailed from Newport, and on the 19th of that month she was totally lost on Cape Hatteras, but the owner had not, at the time of making insurance, heard of the loss. In the New York newspapers of the 3d of February, and one of the Boston newspapers of the 6th, it was stated, that "a sloop from the northward was cast away on the night of the 26th ultimo (January) at Ocracock. The crew abandoned her on the same night. The wind shifted, and she was blown off to sea. Nothing could be seen of her the next morning." The question was made, whether, supposing the assured to have seen this news, he was bound to communicate it to the underwriters.

Mr. Justice Story instructed the jury, that "these were public facts open to both parties. Why was the assured bound to communicate these facts? 'A sloop from the northward,' is so general, that though it might excite fears, could lead to no particular application of the loss. Both parties might well have presumed that the sloop on the 26th was beyond the place where the loss is stated to have happened." <sup>1</sup>

611. *The condition of goods insured, as to their being damaged, needs not to be disclosed, for the insurer does not insure against prior damage, however it may have occurred.*

In case of a policy on hemp, the insurer undertook to prove that the hemp was put on board in a damaged state, and objected to the validity of the policy on the ground that this circumstance was not disclosed to him, alleging that hemp put on board in a damaged state was liable to effervesce and take fire. Lord Ellenborough: "I must positively say, that the assured were not bound to represent to the underwriters the state of the goods. It would introduce endless confusion and perpetual controversies if such a duty were imposed upon the assured." <sup>2</sup>

612. *Extraordinary steps, and the exercise of extraordinary*

<sup>1</sup> *Ruggles v. General Interest Ins. Co.* Also *p. v. Commercial Ins. Co.* 1 Sumn. 4 Mas. C. C. 74. See also *Green v. C. C.* 451.  
*Merchants' Ins. Co.* 10 Pick. Mass. 402; <sup>2</sup> *Boyd v. Dubois*, 3 Campb. 133.



*vigilance to obtain intelligence respecting an absent ship, are not requisite.*

A London broker, having finished filling up a policy which he had begun to fill up four days before, left his house at about ten o'clock, and, without calling at his own office, went to the Exchange with the policy, where the underwriter subscribed at about eleven o'clock, and on afterwards going to his office, where his letters were usually left, he found one informing him of the capture of the ship. Sir J. Mansfield, C. J.: "It is somewhat material that the policy was begun a day or two before the insurer signed it." A verdict for the assured was acquiesced in by the court, there being no evidence that the broker had any reason to presume that he had not possession of all the information concerning the ship.<sup>1</sup>

Where intelligence relative to an application for insurance, communicated by a member of a firm, then in New York, in a postscript to a letter addressed to his wife in New Bedford, to be communicated to his partner in the latter place, that he might represent it to the insurance company, was not put into the hands of the latter until after the policy had been written, the delay having happened through the forgetfulness of a third person, who took the letter from the vessel by which it was sent, Mr. Justice Morton instructed the jury, that if the communication of it "had not been delayed fraudulently, by the circuitous direction of it, it was immaterial."<sup>2</sup>

613. *If the time of the vessel's sailing or being spoken is material to the estimate of the risk, it must be represented.<sup>3</sup> And so also of the national character of the subject.<sup>4</sup>*

614. *The applicant or broker, having applied or given instructions to apply for a policy, is bound to disclose subsequent knowledge or intelligence of a loss, or countermand the order, if in time.<sup>5</sup>*

<sup>1</sup> Wake v. Atty, 4 Taunt. 493.

<sup>3</sup> Vide infra, s. 13.

<sup>2</sup> Green v. Merchants' Ins. Co. 10 Pick. Mass. 402.

<sup>4</sup> Vide infra, s. 14.

<sup>5</sup> Vide supra, s. 3.

SECTION XIII. THE TIME OF SAILING, OR BEING SPOKEN.

615. *The assured or his broker, who effects a policy, is bound to disclose his intelligence or knowledge of the time of the vessel's having sailed, or being expected to sail, or being spoken, where it affords any ground for supposing it to be out of time, or will be long detained,<sup>1</sup> but not if it affords no such ground.<sup>2</sup>*

616. *If the time of sailing be incorrectly represented, so as to induce the underwriters to suppose that the vessel is not out of time, when in fact she is so, the policy will not bind the underwriters.<sup>3</sup>*

617. *In determining whether there is a concealment of the fact of the vessel being out of time, the whole representation and all the circumstances must be taken together.*

Where it was stated by the assured, that a ship that had arrived at a neighboring port had sailed after the ship insured, the not stating the date of the arrival, was held by Mr. Justice Story not to be material, on the grounds, that the time of the sailing of the vessel insured was stated to have been three days earlier than the actual time; that the time of the arrival of the other vessel was stated in a newspaper taken at the office of the underwriters; and that by the representation made the insurers were put upon inquiry, and were bound to have asked for the time of arrival of that vessel, if they desired to be informed.<sup>4</sup>

618. *A policy from and at a place imports of itself that the vessel is there, or soon will be there, and ready to sail.<sup>5</sup>*

619. *The circumstance that the vessel is not ready to sail immediately, may not be material to the risk, and if it is not so it need not be stated.*

<sup>1</sup> M'Andrews v. Bell, 1 Esp. 373; Webster v. Foster, 1 Esp. 407; Willis v. Glover, 4 Bos. & P. 14; Livingston v. Delafield, 3 Caines, N. Y. 49; Kay v. Young, Millar, Ins. 62; Johnson v. Phoenix Ins. Co. 1 Wash. C. C. 378; M'Lanahan v. Universal Ins. Co. 1 Pet. 170.

<sup>2</sup> Littledale v. Kenyon, 4 Bos. & P. 151; Foley v. Moline, 1 Marsh. 117, 5 Taunt. 430.

<sup>3</sup> Roberts v. Fonnereau, Park, Ins. 285; M'Lanahan v. Universal Ins. Co. 1 Pet. 170.

<sup>4</sup> Alsop v. Commercial Ins. Co. 1 Sumn. C. C. 451. See also Maryland Ins. Co. and Phoenix Ins. Co. v. Bathurst, 5 Gill & J. Md. 159.

<sup>5</sup> Hull v. Cooper, 14 East, 479.

At the time of effecting a policy, on the 19th of June, a vessel insured from Pictou, in Nova Scotia, to Liverpool, had received damage on the outward voyage, and stood in need of great repairs, which it was known would detain her at Pictou for some time. This was not communicated to the underwriters. Lord Ellenborough remarked to the jury, that it was not necessary to state that repairs were necessary in all cases where they were so.<sup>1</sup> This must evidently depend upon the probable time of the detention, and whether the risks of the voyage would be thereby aggravated by its coming in a different season of the year.

In a case upon a policy on a vessel from Plymouth to Bristol, the broker, who had instructions that the vessel was ready to sail on the 24th of December, represented that she was in port on that day, whereas she had sailed on the 23d. Lord Mansfield said: "This was a material concealment and misrepresentation."<sup>2</sup>

The same judge gave a similar instruction to the jury in another similar case.<sup>3</sup>

620. *The importance of any error in stating the time of the vessel's sailing will depend on the length of the voyage, and other circumstances.* A difference of a few days will make a vessel out of time in a short voyage, and yet would be of small account in a long one.

In the case of a policy on a vessel from Boston to Surinam, it was represented to the insurers in New York, that she had been out about nine weeks, whereas she had in fact been out ten weeks and four days, yet the jury found a verdict in favor of the assured, on the ground that, if the fact had been correctly stated, it would not have shown the vessel to be out of time, and accordingly would not have given the insurers any reason to refuse the risk.<sup>4</sup>

In effecting a policy upon a vessel from Cape St. François to Baltimore, the assured made the following representation: "I have information of the vessel's sailing, and she has been out twenty-six days." She had been out twenty-seven days, and

<sup>1</sup> Beckwith v. Sidebotham, 1 Campb. 116.

<sup>2</sup> Fillis v. Brutton, Park, Ins. 292.

<sup>3</sup> Ratcliffe v. Shoolbred, Park, Ins. 290.

<sup>4</sup> Mackay v. Rhinelander, 1 Johns. Cas. N. Y. 408.

the underwriters objected to paying the loss, on the ground that this was a misrepresentation, and also because the assured had not disclosed that another vessel had sailed after his, and arrived. The jury found a verdict in favor of the assured, not deeming the difference of a day material in that voyage. The court would not set aside the verdict. As to the other objection, they said that the insurers must know that another vessel had arrived that sailed after the one insured, otherwise the information of her time of sailing could not have been received.<sup>1</sup>

The assured had received letters from the master of the ship at St. Domingo, by which he was informed that she would be ready to sail for France between the 5th and 10th of October. It was represented to the insurers, that the ship would sail in October. It was the opinion of the witnesses, and seems to have been that of Lord Kenyon, that this was not a fair and full disclosure of the intelligence.<sup>2</sup>

So a representation that the ship was expected to be loaded between the 13th and 20th of September, when she was known to have been loaded on the 13th, was held in Scotland to be a misrepresentation.<sup>3</sup>

A statement that the ship would sail in a certain month may, under the circumstances, mean merely that she is expected to sail in that month. In written proposals for insurance at Baltimore, in May, 1820, on the cargo of the brig *Eugene*, from Rio de La Plata to Havana, the party applying stated, that the "brig would sail from La Plata in the course of this month." She in fact did not sail from Monte Video until the 12th of July. A loss occurring, the underwriters objected that this was a misrepresentation. The court, considering the voyage, the distance of the proposed port of departure from the place where the policy was made, and the situation of the parties at the time, construed this statement to be only the expression of an opinion and expectation, and not as a representation upon the supposed literal accuracy of which the contract was made. "A future event was spoken of in its nature contingent, and of which the party speaking could not possibly possess any certain knowledge."

<sup>1</sup> *Williams v. Delafield*, 2 Caines, N. Y. 329.

<sup>3</sup> *Stewart v. Morrison*, Millar, Ins. 59.

<sup>2</sup> *Chauraud v. Angerstein*, Peake, 43.



The fact that the statement was made by the owner of the cargo, who was not an owner of the vessel, and could have no control of her time of sailing, was considered of importance as affecting the construction. There was no evidence that the difference of time was material to the risk. The court, however, said, that, if the difference in time of sailing had been material to the risk, the statement would not have affected the policy; and it was accordingly held not to be a misrepresentation.<sup>1</sup>

The master wrote to the assured that he should sail "on the 12th;" the assured represented to the underwriters that the vessel was to sail "about the 12th." This was held not to be a misrepresentation.<sup>2</sup>

A statement by the assured, on the 4th of January, that the ship did not sail on the voyage insured, from Belfast, in Ireland, to New Orleans, before the 18th of October, when in fact she sailed on the 6th of that month, the usual passage being fifty or fifty-five days, was held to be a misrepresentation that defeated the policy.<sup>3</sup>

At the time of effecting a policy, November 12th, "on wines on board the Stag, from Oporto to Liverpool," a part of the premium to be returned for convoy, the assured did not disclose either of two letters, received October the 30th, from his correspondents at Oporto, one of the 11th of the same month, saying, "We are loading the wines on the Stag, Captain Wheatley, who *pretends* to sail after to-morrow," the other of the 13th, by which it appeared that she was to sail with convoy. The convoy with which she proposed to sail had arrived on the 30th of October, and the Stag was not included in the list of ships entered at Lloyd's as having sailed with convoy. Lord Ellenborough said: "The letter of the 11th would have made known to the insurer the captain's intended time of sailing; that of the 13th, that the lading was completed, and she was ready to sail;

<sup>1</sup> *Allegre's Adm'rs v. Maryland Ins. Co.* 2 Gill & J. Md. 136. The court held in *Augusta & Co. v. Abbott*, 12 Md. 348.

cited, in favor of the decision, *Rice v. New England Ins. Co.* 4 Pick. Mass. 439, and as leaning against it, *Lillie v. Denison*, 3 Bligh, 220. Same point

<sup>2</sup> *Rice v. N. E. Marine Ins. Co.* 4 Pick. Mass. 439.

<sup>3</sup> *Curell v. Miss. Mar. & Fire Ins. Co.* 9 La. 163.

he would have found that the convoy had arrived without her, and from that circumstance must have inferred a disappointment in the original intention of the parties; I cannot help thinking these letters were material." Le Blanc, J., thought that the facts, if disclosed, would have shown that the ship was a missing ship.<sup>1</sup>

A policy on a ship at and from Malaga to London was made in London, November 3d. The assured represented that she had been spoken off St. Vincent, October 14th, by the F., which had arrived at London October 30th, but omitted to state that she had spoken the same vessel off Oporto on the 21st of October, and parted company in a storm. Lord Abinger, C. B., deemed this omission immaterial, as it would have only shown that she had performed the most dangerous part of the voyage. But the Court of Exchequer decided in favor of putting the question to the jury.<sup>2</sup>

621. *The fact that the ship has sailed before the policy is effected, is not necessarily material.*

Where the policy was on a ship at and from London, lost or not lost, for a certain voyage, and the fact that she had already sailed was not disclosed, the court said, "If the underwriter wanted to know whether the ship had sailed, he ought to have inquired."<sup>3</sup>

622. *It is not usually necessary in a retrospective insurance, to make known to the insurers that the vessel is a fast sailer.* If the assured gives the vessel so favorable a character, that the underwriters may infer that she is a fast sailer, this will at least render any specific statement of the fact unnecessary.<sup>4</sup>

The sailing qualities of the vessel may evidently be material in a retrospective insurance in reference to its being out of time; but it must be the case of an extraordinary vessel, and of nicely balanced circumstances, to render it obligatory on the applicant to make such a statement in the first instance, though he will be bound to make true replies to inquiries.

<sup>1</sup> Bridges v. Hunter, 1 Maule & S. 15. also Fiske v. N. E. Marine Ins. Co. 15 Pick. Mass. 310; Elton v. Larkins, 5

<sup>2</sup> Westerbury v. Aberdeen, 2 Mees. Carr. & P. 385; 8 Bingh. 198. & W. Exch. 267.

<sup>4</sup> Ruggles v. General Interest Ins. Co.

<sup>3</sup> Fort v. Lee, 3 Taunt. 381. See 4 Mas. C. C. 74.

623. *Whether a strict compliance with a representation of the time of sailing is requisite?*<sup>1</sup>

#### SECTION XIV. NATIONAL CHARACTER AND BELLIGERENT RISK.

624. *The assured must disclose, if known to him or he is bound to know, and not known to the underwriter, by the provisions of the policy or otherwise, or presumed to be so, that the interest insured, whether in the ship or goods, is belligerent;*

*Or that other goods by the same ship are belligerent;*

*Or that the goods insured are contraband of war;*

*Or that he or any other shipper has shipped other goods that are contraband of war;*

*Or that it is intended to violate a blockade;*

*Or that any other circumstance will expose the insured property to capture, seizure, confiscation, or detention, by a belligerent.*

As in case of the property belonging to a house established in a belligerent country, and so being of a decidedly belligerent character.<sup>2</sup>

Mr. Justice Washington remarks, that where, by "the established adjudications of belligerent courts not generally known, any circumstances become grounds of condemnation, though in opposition to the law of nations, those circumstances, if known to the assured, ought to be disclosed."<sup>3</sup>

625. *Circumstances affecting the risk during war, that are known to the insurers, need not be represented.*<sup>4</sup>

Underwriters may be bound by the course of the trade at the particular time, without any representation on the subject, to take notice that belligerent property in disguise will be on board of a vessel.<sup>5</sup>

Insurers are presumed to have a knowledge of public transactions,<sup>6</sup> and of the state of the world, of the allegiance of particular countries, of the risks and embarrassments affecting their

<sup>1</sup> See *infra*, s. 19.

<sup>4</sup> *Bowne v. Shaw*, 1 Caines, N. Y.

<sup>2</sup> *Bauduy v. Union Ins. Co.* 2 Wash. 489.  
C. C. 391.

<sup>5</sup> *Maryland & Phoenix Ins. Co. v. Bathurst*, 5 Gill & J. Md. 159.

<sup>3</sup> *Marshall v. Union Ins. Co.* 2 Wash. C. C. 357.

<sup>6</sup> Per Washington J., in *Kohne v.*

commerce, and of the course and incidents of the trade;<sup>1</sup> and these, accordingly, need not be stated by the assured, as affecting the marine perils both to belligerents and neutrals.

Where goods, the produce of a belligerent Spanish colony, and brought thence by a belligerent to the United States, and there sold, were insured thence to Spain warranted neutral, Mr. Justice Washington was of opinion that the fact of their being the produce of such colony need not be disclosed. He thought the assured was not bound to anticipate every possible ground of suspicion.<sup>2</sup>

Two policies were effected in Baltimore, insuring B. & K. for whom it might concern, on a cargo from Porto Rico to Baltimore, Porto Rico being then in a state of revolt and war with Spain. The insurances were on the order of F., an American then at Porto Rico, in whose name the cargo was shipped, and to whom it was consigned. Nothing was said of the ownership on making the first policy. On applying for the second, a letter from F. was exhibited, saying, "When I wrote, I could not say what amount of cargo to have insured for me; I now think I shall have on board \$8000, which amount I wish to have insured for me." A part of the cargo belonged to a resident in Porto Rico, who came passenger in the vessel. The property was lost by perils of the seas.

The underwriters objected to payment, on the ground of concealment of the part-ownership of the Spanish subject. A verdict being given in favor of the assured on both policies, the Supreme Court of the United States refused upon two grounds to set it aside, namely:—1st, that in the then state of Porto Rico, the underwriters were presumed to know that property from that island, belonging to persons residing there, was ordinarily shipped in the name of a neutral, and the correspondence relating to it would so represent it, because it was exposed to be overhauled by cruisers; and 2d, that as the policy was in a form to cover the property of a belligerent, the underwriters were, under the circum-

Ins. Co. of North America, 1 Wash. C. C. 93.

Hendrick v. Chesapeake Ins. Co. 1 Pet. 151.

<sup>1</sup> Per Johnson, J., giving the opinion of the Supreme Court in *Buck and*

<sup>2</sup> *Marshall v. Union Ins. Co.* 2 Wash. C. C. 357.



stances, bound to have made inquiry, if they proposed to exclude such a risk.<sup>1</sup>

Goods insured from Newport to Passage, in Spain, had been brought from La Guira, then a belligerent colony, and not unloaded in the United States, and so were at the time more liable to capture as Spanish. Mr. Justice Washington was of opinion, that the omission to disclose this fact was a concealment that vitiated the policy, though many cargoes had been carried in the same way.<sup>2</sup>

Where the policy on the ship was against "all risks," and contained no warranty of neutrality, and a letter from the master was shown to the underwriters, stating that he had chartered the ship in England to go "to one of the following ports in the Columbian government,—La Guira, Santa Martha, or Carthagena;" it was held that the underwriters were thus sufficiently apprised that the ship might have been chartered by an agent of a Spanish South American government, to carry out warlike supplies, that being a great part of the ordinary transportation on such a voyage at the time, and there being at the time no full cargo carried by a ship of the size of the one insured, that did not consist wholly or partly of such articles.<sup>3</sup>

If the property is accompanied by a letter of instructions exposing it to capture and condemnation, according to the well-known decisions of a foreign court of admiralty, Mr. Justice Washington was of opinion that the circumstance should be made known, "and it was immaterial whether those decisions were consistent with the law of nations or not, as the danger of capture was the same."<sup>4</sup>

626. *If the ship or cargo is represented to be neutral, it must be owned by neutrals, and be accompanied by documents and insignia as such, and be managed as such.*<sup>5</sup>

627. The national character of the property is generally a

<sup>1</sup> Buck v. Chesapeake Ins. Co. 1 Pet. 151.

<sup>2</sup> Kohne v. Ins. Co. of North America, 1 Wash. C. C. 93; 6 Binn. Penn. 219.

<sup>3</sup> Maryland & Phoenix Ins. Co. v. Bathurst, 5 Gill & J. Md. 159.

<sup>4</sup> Sperry v. Delaware Ins. Co. 2 Wash. C. C. 243.

<sup>5</sup> Vandenheuevel v. United Ins. Co. 2 Johns. Cas. N. Y. 451; Same v. Church, id. 173, n.; Steel v. Lacy, 3 Taunt. 285; Fisher v. Ogle, 1 Campb. 418; Von Tuglen v. Dubois, 2 Campb. 151.

subject of warranty, and not of representation, but *if the national character of the assured is not known to the insurers, and is such as to expose the property to more than ordinary danger of capture, it must be disclosed.*<sup>1</sup>

It has been held that the interest of a subject of a belligerent country, as *cestui que trust*, in a ship insured in the name of a neutral, must be disclosed.<sup>2</sup>

It was held in New York, that the assured in a policy effected in that State was not bound to disclose that he had emigrated from France to the United States during a war then pending between France and England.<sup>3</sup> But this is inconsistent with the cases above cited, and with the fundamental doctrine relative to representation of the belligerent character or insignia of property apparently neutral. The case is supposed to be one where the assured is apparently a neutral, for if the underwriter knows him to be a belligerent, or, which is the same, to have emigrated from a belligerent country during the war, there is no room left for a question about representation. If, therefore, from the circumstances he is liable to be taken for a neutral, and is so taken, it is a palpable case of concealment, or implied misrepresentation. A decision by the English K. B. in an analogous case is directly opposed to those last referred to. A ship and cargo being insured in England from that country to the United States, against all risks, "American capture or seizure included," the broker omitted to disclose that the property belonged to Americans. Chief Justice Abbott said, "An American subject, to whom a ship and goods are consigned in America, if he knows that he is insured against American capture and seizure, may not only omit to take proper means to prevent loss, but may possibly facilitate it by giving information to his own government upon the subject." The policy was accordingly held to be void, on the ground that the insurers ought to have been informed that the property belonged to Americans.<sup>4</sup>

<sup>1</sup> Campbell v. Innes, 4 Barnw. & Ald. 423. But see Hodgson v. Marine Ins. Co. 5 Cranch, 100.

<sup>2</sup> Murray v. United Ins. Co. 2 Johns. Cas. N. Y. 168.

<sup>3</sup> Duguet v. Rhinelanders, 1 Caines, Cas. N. Y.; 2 Johns. Cas. N. Y. 476. But see 1 Johns. Cas. N. Y. 360.

<sup>4</sup> Campbell v. Innes, 4 Barnw. & Ald. 423.

628. *Under an insurance on "all lawful goods," an assured is not required to disclose that the goods are contraband.*<sup>1</sup>

Much less is the master of a vessel, who is insured on his commission on "lawful goods," required to disclose that contraband goods are shipped by others in the vessel.<sup>2</sup>

629. *The owner of a neutral vessel, knowing that she takes belligerent goods disguised as neutral, is bound to disclose the fact in effecting a policy.*<sup>3</sup>

630. *The assured on a neutral ship is not bound to disclose that the supercargo is a belligerent, unless he himself knows that by an ordinance or the practice of the other belligerent country this will subject the ship to condemnation.*

As in case of a Portuguese neutral ship having an English supercargo, England and France being then at war.<sup>4</sup>

631. *A representation that the assured on a ship wishes to be covered against all risk, including contraband, is not necessarily an implied representation that it is neutral, but may be merely an expression of desire to be covered against the risk of contraband, in case the vessel should be neutral and should have contraband goods on board.*<sup>5</sup>

632. Where the law requires registered ships not to sail without convoy, the assured need not state, unless inquiry is made, that the vessel is not registered, and so may sail without convoy.<sup>6</sup>

633. Where *the broker* was informed by the owner of the goods insured from Bristol to Mahon, that the ship "was to have gone to Falmouth to join convoy, but he supposed the wind was contrary and she could not fetch the port, but he knew nothing about it himself," but *did not disclose* this circumstance to the insurers, though he knew it be a fact *that the vessel had sailed without convoy*; this was held to be a material concealment.<sup>7</sup>

634. Whether the non-communication of a fact affecting the belligerent risk defeats the policy, or only excepts the risk?<sup>8</sup>

<sup>1</sup> Seton v. Low, 1 Johns. Cas. N. Y. 1; Juhel v. Rhineland, 2 Johns. Cas. N. Y. 120; Rhineland v. Juhel, id. 487.

<sup>2</sup> Depeyster v. Gardner, 1 Caines, N. Y. 492.

<sup>3</sup> Stocker v. Merrimack Ins. Co. 6 Mass. 220.

<sup>4</sup> Mayne v. Walter, Dougl. 79.

<sup>5</sup> Maryland Ins. Co. and Phoenix Ins. Co. v. Bathurst, 5 Gill & J. Md. 159; supra, No. 625.

<sup>6</sup> Long v. Duff, 2 Bos. & P. 209.

<sup>7</sup> Sawtell v. Loudon, 5 Taunt. 359; S. C. 1 Marsh. 99.

<sup>8</sup> Vide infra, s. 20.

SECTION XV. REPRESENTATION AND CONCEALMENT IN INSURANCE  
AGAINST FIRE.

635. It has been suggested that there is a difference between marine and fire insurance, in respect of the obligation to make disclosures of facts not inquired about.<sup>1</sup> The difference is not, however, I apprehend, so much one of doctrine as of the subject matter, and of the degree of confidence necessarily placed in the assured by the underwriter. The subject of a fire policy is usually stationary, and the risk local, and within the limits of actual inspection by the insurers or their agents. The circumstances affecting the degree of risk are, accordingly, less various and numerous, and more within the insurer's actual or possible knowledge. And, besides, the inquiries put to the assured, his answers to which are usually referred to in the policy, are intended by the insurer to cover, and usually do actually cover, all the circumstances affecting the risk material to be disclosed.

*Any circumstance evidently and materially enhancing the risk of fire, known to the applicant at the time of insuring,<sup>2</sup> and not so, or presumed to be so, to the insurer, and of which he is not bound to inform himself or to take the risk of it, must be disclosed, though no inquiry is made respecting it.*

Where a part of the insured premises was occupied for gambling, and the insurers suggested, as an objection, the vicinity of the premises to another gambling establishment, it was held in Louisiana, that, if the risk was, in the opinion of the jury, materially aggravated by such occupancy of a part of the premises, it was obligatory on the applicant to have represented the fact, and the suppressing of it would defeat the policy.<sup>3</sup>

In this case, what passed between the parties suggested this disclosure to the applicant, which strengthened the obligation to make a representation of the fact, if there was any ground to suppose the risk to be enhanced by that kind of occupancy.

<sup>1</sup> *Burritt v. Saratoga Mut. Ins. Co.* 5 Hill, N. Y. 188.      *Cumberland Val. Ins. Co. v. Schell*, 29 Penn. St. 31.

<sup>2</sup> *Pim v. Reid*, 6 Mann. & G. 1;      <sup>3</sup> *Lyon v. Commercial Ins. Co.* 2 Rob. La. 266.



The proposition is stated, in giving the opinion of the Supreme Court of the United States, that, if the mode of occupying a room in a factory varies from the ordinary practice, and is such as the insurers were not bound to presume in such a building as the one described, and is such as materially to enhance the risk, the assured is bound to disclose it, and if he neglects to do so, the policy will be void.<sup>1</sup>

A Louisiana case is an appropriate illustration of the proposition just stated, in which the assured suppressed the fact of a rumor of an attempt to set fire to a ropewalk next to the one he proposed for insurance, whereupon his policy was adjudged to be void.<sup>2</sup>

A person resident at Heligoland wrote on Saturday, the 11th of July, to the directors of an insurance company in England, for insurance "on a warehouse situated in the town of Heligoland," not stating that it was separated only by one other building from another warehouse, which had been on fire the day when he wrote. The fire was supposed to have been extinguished by eight o'clock in the evening, but it was considered to be necessary to watch the premises during the night. The fire broke out again on the Monday morning following, and consumed, among other buildings, the warehouse insured. This was considered to be a material concealment.<sup>3</sup>

Mr. Justice Putnam charged the jury, in respect to a threat alleged to have been made by a convict in the state-prison, that, on getting out, he would set fire to a house, that, if under the circumstances they considered that the risk of fire was thereby materially increased, the omission to disclose the fact of the threat to the underwriters, at the time of effecting the policy on the house, was a material concealment, and made the insurance void.<sup>4</sup>

In stating the number of stories to a building, the cellar need not be included.<sup>5</sup>

<sup>1</sup> *Clark v. Manufacturers' Ins. Co.* 8 How. 235.

<sup>2</sup> *Walden v. Louisiana Ins. Co.* 12 La. 134.

<sup>3</sup> *Bufe v. Turner*, 2 Marsh. 46; 6 Taunt. 338.

<sup>4</sup> *Curry v. Commonwealth Ins. Co.* 10 Pick. Mass. 535. See *Haley v. Dorchester Ins. Co.* 12 Gray, Mass. 545.

<sup>5</sup> *Benedict v. Ocean Ins. Co.* 27 N. H. 149.

So in all the cases cited below, respecting the disclosure of a qualified, temporary, or defeasible title, where no inquiry is made touching the title, it is expressly stated, that, if this had materially enhanced the risk, the suppression of it would have defeated the insurance.

636. *In general, the use made of a building, and how it is heated, needs not to be represented, except in reply to inquiries:*<sup>1</sup>

So held of the use of a stove in a carpenter's shop near the insured building.<sup>2</sup>

Where the rules of a fire office made a distinction between the premiums on inns and other buildings, a building used as a coffee-house, in London, was insured without being described, or payment of premium for it, as an inn. Lord Ellenborough: "I think a coffee-house is not an 'inn,' within the meaning of the policy. Horses, wagons, and coaches come to an inn; there are stables and out-houses attached to it; people are going to them at all hours. Hence the trade of an innkeeper is considered doubly hazardous; but the trade of a coffee-house keeper is of a very different description."<sup>3</sup>

It was held in Missouri that the fact that a house was a house of ill fame was immaterial.<sup>4</sup>

A representation that an apparatus was put up in the proposed building for burning anthracite coal, does not restrain the assured to such fuel, nor require that he should use it.<sup>5</sup>

637. Companies that insure against fire usually adopt certain rules respecting representations, or put certain inquiries requiring the assured to make known of what materials a building proposed to be insured is constructed, for what purpose it is occupied, and what kind of buildings are situated near to it; whether the goods proposed for insurance are held in trust; what kind of goods they are; the description and situation of the building in which they are stored, and other circumstances showing the degree of risk.<sup>6</sup>

<sup>1</sup> Clark v. Manufacturers' Ins. Co. 8 How. 235; Howard Ins. Co. v. Cormick, 24 Ill. 554.

<sup>2</sup> Girard Ins. Co. v. Stephenson, 37 Penn. St. 293.

<sup>3</sup> Doe ex dem. Pitt v. Lansing, 4 Campb. 76. See Hobby v. Dana, 17 Barb. N. Y. 111.

<sup>4</sup> Lochner v. Home Ins. Co. 17 Mo. 247.

<sup>5</sup> Tillou v. Kingston Mut. Ins. Co. 7 Barb. N. Y. 570.

<sup>6</sup> Newcastle Fire Ins. Co. v. Macmorran, 3 Dow, Parl. Cas. 225.

These rules and regulations are usually brought home to the knowledge of the assured, and made binding upon him by some questions answered by him, or by their being indorsed on the policy, or annexed to it, and referred to in it. A delivery of the regulations of a company to the agent of the assured, affects the latter with a knowledge of them.<sup>1</sup>

638. *The assured*, being thus informed by interrogatories or otherwise on what matters he is required to make representations, is accordingly bound to make true statements of the facts inquired about. But he needs not to go into details not inquired about.<sup>2</sup>

*The answers of the assured to inquiries respecting the situation, condition, use, superintendence, and management of the insured property*, if construed to be representations, must be substantially true, and complied with, and still more rigidly and exactly, if construed to be warranties.

It is difficult to distinguish in this and many other cases, what phraseology makes a warranty, from what is only a representation, and the phraseology which will make either from what is only description to identify the subject of the insurance. And when a provision has been construed to amount to a warranty or to be merely a representation, it still is difficult, in many cases, to distinguish what is a "literally" true,<sup>3</sup> or strictly accurate statement of the facts, from one that is only substantially true.<sup>4</sup> The cases would have presented fewer difficulties of construction if the early jurisprudence had been less open to the admission of forfeitures of the policy, and more easily satisfied with a compliance with written stipulations substantially equivalent to a literal one, where such a construction was not inconsistent with the express provisions of the contract. The recent jurisprudence tends to greater liberality of construction in favor of maintaining the contract. Such a rule may be as well applied to stipulations and recitals in the policy, as to representations preliminary and collateral to it; and it is more equitable, after the policy has once gone into effect, and the underwriter has a right to retain the premium, that the contract should be continued in force as long

<sup>1</sup> *Newcastle Fire Ins. Co. v. Macmorran*, 3 Dow, Parl. Cas. 225.

<sup>3</sup> *Blackhurst v. Cockrell*, 3 Term, 360; *Houghton v. Manufacturers' Ins.*

<sup>2</sup> *Beebe v. Hartford Ins. Co.* 25 Conn. 51.

*Co.* 8 Metc. Mass. 114.

See *supra*, No. 669, 670 et seq.

as its being maintained is consistent with its express provisions, and the underwriter is not thereby prejudiced. Even where the assured has voluntarily for a time incurred an extra risk, or voluntarily varied or increased the risks insured against, it has been held, in some cases, that he has not thereby absolutely forfeited the contract, but has only incurred a temporary suspension of it, or that he must himself bear the extra risk thus unnecessarily superinduced, where a loss thereby can be distinguished from other losses.<sup>1</sup> The principle of this equitable jurisprudence in respect to the consequences of some cases of deviation, is equally applicable to warranties.

The distinction of warranties, representations, and mere descriptions, is illustrated by the jurisprudence referred to under all those heads.<sup>2</sup>

Where the answers of the applicant were referred to in the policy by the term "representations," Shaw, C. J., and his associates, construed them to be only such, and held that the answer that the ashes of the furnaces of a factory were put into iron vessels, was complied with by the use of copper or other equivalent vessels.<sup>3</sup> And so, under a policy on a dwelling-house, the same court held the representation that the ashes were kept "in brick," was complied with by their being kept in copper or other equivalent vessels.<sup>4</sup>

So a substantial compliance with a representation of the watch kept and the hours for work in a factory, is held to be sufficient.<sup>5</sup>

So a policy, being on merchandise in a "stone building," is held by Savage, C. J., and his associates, to impliedly represent, but not warrant, such a building, and to be applicable and valid, though the gable-ends of the building were of wood, evidence being given that it was as safe as if they had been of stone.<sup>6</sup>

<sup>1</sup> *Infra*, Nos. 734, 751, 975, 978.

<sup>5</sup> *Glendale Woollen Co. v. Protection*

<sup>2</sup> *Supra*, Nos. 70, 71, 72, 485 et seq. 527, 553, 569, 575, 603; *infra*, Nos. 640, 641, 652, 669, 670, 673, 674, 762, 866, 871, 872, 892.

*Ins. Co. 21 Conn. 19; Crocker v. People's, &c. Ins. Co. 8 Cush. Mass. 79. But see Ripley v. Ætna Ins. Co. 30 N. Y. 13.6*

<sup>3</sup> *Houghton v. Manufacturers' Mut. Fire Ins. Co. 8 Metc. Mass. 114.*

<sup>6</sup> *Snyder v. Farmers' Ins. and Loan Co. 13 Wend. N. Y. 92.*

<sup>4</sup> *Underhill v. Agawam Mut. Fire Ins. Co. 6 Cush. Mass. 440.*



A house described as "a stone house," had a wooden kitchen attached; held a breach of warranty.<sup>1</sup>

An insured building being described in the application found wafered to the policy, though it did not appear by whom, to be a "steam saw-mill about 130 feet long and 30 broad," but not, as appears, specifically described in the policy itself, was in fact 132 feet long, and, for a distance of forty feet, in the central part of its length, was forty feet wide, including in that distance the boiler-house ten feet wide and ten feet high, attached to the main building. Mr. Justice Sutherland gave the opinion of the Supreme Court of New York, that this was a representation, and was complied with, this manner of placing the boiler being stated by witnesses to be proper, and to be safer than putting it within the main building.<sup>2</sup>

638 a. *It being required to specify what buildings are within a certain distance from the one insured, or in which goods are insured, the applicant must answer the inquiry with strict or substantial accuracy, according as the case is one of representation or warranty, if any such distinction can be made in this case, it not being apparent that it can be.*

This inquiry is usually so made and the answer so referred to and the provisions of the policy are usually such, as to make it a condition of the contract that a strictly correct answer shall be given.<sup>3</sup>

The requisition of a statement of *other buildings near enough to endanger the one insured*, not specifying any distance, does not extend to all buildings which might by possibility endanger it, but only to such as would ordinarily be considered as having that effect.<sup>4</sup>

639. *The rule, that the express provisions of the policy cannot*

<sup>1</sup> Chase v. Hamilton Ins. Co. 20 N. Y. 52. See also Mead v. North Western Ins. Co. 7 N. Y. 530.

<sup>2</sup> Jefferson Ins. Co. v. Cotheal, 7 Wend. N. Y. 72.

<sup>3</sup> See Burrill v. Saratoga County Mut. Fire Ins. Co. 5 Hill, N. Y. 188; French v. Chenango County Mut. Ins. Co. 7 id. 122; Jennings v. Chenango County Mut. Ins. Co. 2 Den. N. Y. 75;

Frost v. Saratoga Mut. Ins. Co. 5 id. 154; Gates v. Madison County Mut. Fire Ins. Co. 3 Barb. N. Y. 73; 2 N. Y.

43. See infra, c. 9, s. 10. Objection on account of the insufficiency of the answer in the last of the above cited cases was held to have been waived. See infra, No. 904.

<sup>4</sup> Dennison v. Thomaston Mut. Ins. Co. 20 Me. 125.

*be superseded by proof of a representation, is applicable in fire as well as marine insurance.*

In a suit on a fire policy upon fixtures, &c., in, and to be put into buildings, the whole value of which, at the time of a loss, was \$100,000, the underwriter was not permitted to prove that the assured represented, at the time of making the policy, that their value would not exceed \$5000.<sup>1</sup>

640. *The assured needs not to state that his interest in the building is a qualified, or conditional, or temporary one, unless inquiries are made on this subject :*

As in case of the assured owning but half of the insured building;<sup>2</sup>

Or of the building being put on land of another than the assured;<sup>3</sup>

Or being insured by the assured as his own, his interest being an undivided moiety belonging to his wife, in which he had a life interest;<sup>4</sup>

Or being insured as "his," the assured's "building," where the interest was a lease for one year;<sup>5</sup>

Or being described as "his," the assured's "dwelling-house," which was then being built on land that he had absolutely agreed to purchase, and on which he had made sundry payments on his agreement;<sup>6</sup> otherwise where the purchase was conditional;<sup>7</sup>

Or belonging to the assured only as mortgagee;<sup>8</sup>

Or being mortgaged by the assured, and the assured's equity of redemption being, besides, at the time, seized on execution, but the interest not irrevocably divested before the time of the loss taking place.<sup>9</sup>

<sup>1</sup> New York Gas-Light Co. v. Mechanics' Fire Ins. Co. 2 Hall, N. Y. 108. See also Glendale Woollen Co. v. Protection Ins. Co. 21 Conn. 19.

<sup>2</sup> Catron v. Tennessee Ins. Co. 6 Humphr. Tenn. 176.

<sup>3</sup> Fletcher v. Commonwealth Ins. Co. 18 Pick. Mass. 419.

<sup>4</sup> Curry v. Commonwealth Ins. Co. 10 Pick. Mass. 535; Mut. Ins. Co. v. Deale, 18 Md. 26.

<sup>5</sup> Niblo v. North American Ins. Co. 1 Sandf. N. Y. 551.

<sup>6</sup> Tyler v. Ætna Ins. Co. 12 Wend. N. Y. 507; and 16 Wend. N. Y. 385; Reynolds v. State, &c. Ins. Co. 2 Grant Cas. Penn. 326.

<sup>7</sup> Marshall v. Columbian, &c. Ins. Co. 27 N. H. 157.

<sup>8</sup> Delahay v. Memphis Ins. Co. 8 Humphr. Tenn. 684.

<sup>9</sup> Strong v. Manufacturers' Ins. Co. 10 Pick. Mass. 40.

A building being insured as property "belonging to" the assured, being "their mill," which stood on land subject to a ground-rent, and the title being partly that of possession under a mortgage, and partly subject to a mortgage, and accordingly defeasible, the not disclosing of the tenure was held by the Supreme Court of the United States to be a fatal concealment,<sup>1</sup> on the ground that the assured has not the same motives to preserve the building as if he were an absolute owner. This seems to be an unsatisfactory ground, for if his interest is such that he will lose the amount of the insurance, either absolutely or out of his collateral security, by the destruction of the insured property, he has quite an adequate motive to preserve it. He is authorized to insure it under a general description,<sup>2</sup> which seems to be a case not materially different from the one in question, assuming that no specific inquiry is put to the assured respecting the title.

641. *If the applicant is required to state his title and the encumbrances on a building proposed for insurance, the inquiry is not unfrequently so put, and the answers so referred to in the policy, as to make it a condition that they shall be full and strictly true,<sup>3</sup> but the answers to this inquiry, if not thus made warranties, are merely representations.<sup>4</sup>*

Where the underwriters are by their charter entitled to a lien on the land under an insured building to secure payment of premiums and assessments, it is material that the party insured should himself have the title to the land, or at least an interest to which the lien can attach. Accordingly, in such cases, if the assured in his representations, erroneously pretends to a title when he has none, or represents his title to be better than it is, or omits to state encumbrances in replying to inquiries about them, the policy is void for misrepresentation or concealment.<sup>5</sup>

<sup>1</sup> *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25; and see *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495; *Wyman v. People's, &c. Ins. Co.* 1 All. Mass. 301.

<sup>2</sup> *Supra*, No. 421.

<sup>3</sup> *Locke v. North American Ins. Co.* 13 Mass. 61.

<sup>4</sup> *Infra*, No. 874 a.

<sup>5</sup> *Smith v. Bowditch Mut. Fire Ins. Co.* 6 Cush. Mass. 448; *Richardson v. Maine Ins. Co.* 46 Me. 394; *Patten v. Merchants', &c. Ins. Co.* 38 N. H. 338; *Mutual Ins. Co. v. Deale*, 18 Md. 26; *Lovejoy v. Augusta, &c. Ins. Co.* 45 Me. 472.

Where the assured described the property as "hers" and had only a life estate by devise, the answer was held sufficient.<sup>1</sup>

An unrecorded mortgage is an encumbrance.<sup>2</sup>

It is held in Massachusetts, that the policy is defeated by a misrepresentation that the building is free from encumbrance, though the underwriters are a foreign corporation, and can have no lien on the real estate. The ground of the opinion is stated to be, that the fact of an encumbrance or not, is material, as indicating the responsibility of the assured, and his ability to meet his engagements to the company.<sup>3</sup> Another, and apparently better ground, is that the underwriters, by making the inquiry, are thereby entitled to have it considered material,<sup>4</sup> since the inquiry can have any bearing and relevancy only as affecting the degree of risk, and must accordingly be considered to relate to that.

A policy being for \$4000 on a factory building, dye-house, and machinery, "to cover a mortgage on said property to same amount, lot included," Gibson, C. J., and his associates, held, that the omission to represent that he held prior mortgages on the building, was a concealment, on the ground that the salvage was thereby diminished.<sup>5</sup> There was, however, no difficulty on this account, since the deficiency of the salvage might be deducted in adjusting the loss.<sup>6</sup> There being no inquiry or statement as to prior liens, the contrary ruling by the judge who presided at the trial of the case, seems to be the better construction of the contract.<sup>7</sup>

The title of a corporation is held in Ohio not to authorize a

<sup>1</sup> *Allen v. Charlestown Ins. Co.* 5 Gray, Mass. 384.

<sup>2</sup> *Hutchins v. Cleveland Ins. Co.* 11 Ohio St. 477.

<sup>3</sup> *Davenport v. N. E. Mutual Fire Ins. Co.* 6 Cush. Mass. 340; *Clark v. N. E. Mutual Fire Ins. Co.* id. 342; *Hayward v. New England, &c. Ins. Co.* 10 Cush. Mass. 444.

<sup>4</sup> *Supra*, No. 586.

<sup>5</sup> *Smith v. Columbia Insurance Co.* 17 Penn. St. 253.

<sup>6</sup> *Infra*, No. 1714.

<sup>7</sup> *Smith v. Columbia Ins. Co.* 17 Penn. St. 253, stated more fully, *infra*, No. 1784. The insurance company, in this case, claimed indemnity by an assignment of a lien on the land for the amount, if any, which they were liable to pay. The secretary of the company who took the risk, said that he should not have taken it at five per cent. if he had known of the prior liens. But this testimony seems not to be admissible, or of weight, if so.



representation that the property is that of the individuals who compose the corporation.<sup>1</sup>

Oral notice of a mortgage is sufficient compliance with a requirement that it should be stated.<sup>2</sup>

A statement that the property is encumbered without specifying the amount is sufficient.<sup>3</sup>

The underwriters must be notified of the whole amount of the mortgage debt without regard to other collateral.<sup>4</sup>

Renewal of a policy is sufficient notice of the lien of the old policy.<sup>5</sup>

642. *The description of a building or other subject insured, its situation, and statement of any circumstance connected with it, and the taking out of the policy thereupon, though it may not amount to a warranty, is not only an express representation that the facts stated, so far as they are material to the risk, are substantially true at the time, but, also, an implied promissory representation*<sup>6</sup> that so far as they are of a nature to be continued, and so far as their being continued depends upon the assured, they are to be substantially true during the period of the risk; and if not so, the policy will be forfeited,<sup>7</sup> or at least the risk will be suspended:<sup>8</sup>

As where the assured erects a building on his ground represented to be vacant, so near as to increase the danger of fire:<sup>9</sup>

Or under a statement respecting a building in the process of being built, that there is no stove in it, the putting of one in any time during the risk:<sup>10</sup>

Or not continuing to keep up, to all material purposes, such a watch as is stated to be kept in a factory.<sup>11</sup>

<sup>1</sup> Philips v. Knox County Mutual Ins. Co. 20 Ohio, 174.

<sup>2</sup> Masters v. Madison County Mutual Ins. Co. 11 Barb. N. Y. 624.

<sup>3</sup> Bersche v. St. Louis, &c. Ins. Co. 31 Mo. 555; Nichols v. Fayette, &c. Ins. Co. 1 All. Mass. 63.

<sup>4</sup> Falls v. Conway, &c. Ins. Co. 7 All. Mass. 46.

<sup>5</sup> Ames v. New York, &c. Ins. Co. 14 N. Y. 253.

<sup>6</sup> Held contra that a representation

that no cotton waste, &c. was kept on the premises was not promissory. Gould v. York, &c. Ins. Co. 47 Me. 403. See also Smith v. Mechanics', &c. Ins. Co. 32 N. Y. 399.

<sup>7</sup> Supra, No. 553.

<sup>8</sup> Infra, No. 975.

<sup>9</sup> Stebbins v. Globe Ins. Co. 2 Hall, N. Y. 632.

<sup>10</sup> Williams v. New England Mut. Fire Ins. Co. 31 Me. 219.

<sup>11</sup> Glendale Woollen Co. v. Protec-

An oral statement was made by the assured that he would discontinue the use of a fire-place. The policy was held by the Supreme Court of New York to be made void by a failure to discontinue such use.<sup>1</sup>

An immaterial alteration of an insured building, though when altered it does not precisely correspond to the description of it in the representation, will not cause a forfeiture of the insurance.<sup>2</sup>

In respect to a life as well as a marine or fire insurance,<sup>3</sup> the applicant is not required to make any representation of a fact covered by an express warranty, where he is not specifically inquired of respecting it.<sup>4</sup>

#### SECTION XVI. REPRESENTATION AND CONCEALMENT IN LIFE INSURANCE.

643. *The same general principles as to representation and concealment are applicable to insurances on lives, as to marine and fire policies.*

A ruling by Lord Mansfield<sup>5</sup> is reported as laying down the proposition, that the life is at the risk of the underwriters, and the policy is valid provided there is no warranty or fraudulent concealment or misrepresentation.

If Lord Mansfield so ruled, it must have been in reference to the particular case on trial, for there is not, that I am aware of, either authority or reason for the doctrine that a life policy issued upon a misrepresentation made through negligence or mistake, is valid, or that there is, in this respect, any distinction between a life policy and a marine one.

In case of a life policy, Mr. Justice Bull ruled in a trial in Ire-

tion Ins. Co. 21 Conn. 19. A doctrine different from that above stated is asserted in *Benham v. United Guaranty and Life Ass. Co.* 7 Exch. 744, 14 Eng. L. & Eq. 524.

<sup>1</sup> *Alston v. Mechanics' Ins. Co.* 1 Hill, N. Y. 510. This case was however overruled in the Court of Appeals on the ground that this was an oral subsidiary agreement which could not be

admitted to control the written policy. *Alston v. Mechanics' Ins. Co.* 4 Hill, N. Y. 329.

<sup>2</sup> *Jefferson Ins. Co. v. Cotheal*, 7 Wend. N. Y. 72.

<sup>3</sup> *Supra*, No. 600.

<sup>4</sup> *Ross v. Bradshaw*, 1 W. Blackst. 312.

<sup>5</sup> *Stackpole v. Simon, Marshall, Ins.* 2d ed. 772.

land, under a policy expressed to be issued on the basis of the written statements of the applicant, that the statements were to be treated as representations, and a substantial compliance was sufficient; and this ruling was confirmed by Moore, J., Lefroy, B., Bull, J., Perrin, J., Torrens, J., Pennafether, B., and Blackburne, C. J., of the Irish Court of Exchequer; Jackson J., Pigot, B., and Monhanan, C. J., dissenting. On appeal to the House of Lords, Parke, B., Platt, B., Alderson, B., Martin, B., Coleridge, J., Wightman, J., Williams, J., Erle, J., Creswell, J., Talfourd, J., and Crompton, J., gave opinions unanimously, that the policy was void, whether the false facts stated by the assured in the application were material or not material; that is, that the policy was issued on condition that the statements were true. Lord Chancellor Cranford concurred in that construction, saying, that the basis of the contract was that the applicant should make true answers to the inquiries put, "the assured must adhere to his warranty, whether material or immaterial;" and the judgment below was accordingly reversed.<sup>1</sup>

A life policy issued "upon the basis" of the written statement of the assured in his application, is defeated by a false representation of his health, though his state of health was well known to the agent of the company for procuring the application, who was not, however, authorized to agree for a policy.<sup>2</sup>

644. *Insurance on lives*, like that against fire, *has usually*, if not invariably, *been made upon the basis of written answers to written inquiries*, and the doctrine already stated<sup>3</sup> respecting the stronger obligation to make communication where an inquiry is made, pervades the jurisprudence respecting representation and concealment in such insurance generally.

645. *Most of the inquiries relate to particular subjects*, which are specified, as age, residence, state of health, &c.

646. *Besides the particular inquiries, there is usually a general one, requiring a statement of any other circumstance tending to shorten the proposed life, or which ought to be communicated to the underwriters.* This general inquiry requires only what the

<sup>1</sup> Anderson v. Fitzgerald, 24 Eng. L. & Eq. 1, 4 House L. Cas. 484; <sup>2</sup> Vose v. Eagle L. Ins. Co. 6 Cush. Mass. 42.

Miles v. Connecticut L. Ins. Co. 3 <sup>3</sup> No. 586. Gray, Mass. 580.

implied condition of every life or other policy requires, as to representation.<sup>1</sup>

647. *The assured on a life is bound to make a true and full disclosure of all material facts within his knowledge, and not known, or presumed to be so, to the insurers, which he cannot but know would induce them to demand a higher premium, or decline the risk, though no inquiry is made about such facts.*<sup>2</sup>

Where the broker who applied for the policy states, that "from the account he has received the life is a good one," and he had received no such account, Mr. Marshall is of opinion that the policy is void, though the broker, at the same time, says his principal "will warrant nothing;"<sup>3</sup> and of this there seems to be no ground to doubt. It, however, would be difficult to prove such a misrepresentation except by the broker's own testimony.

Though the subject of a life insurance has some infirmity which does not, however, diminish his expectation of life, he needs not to disclose it, if not inquired about, especially if it comes under a general warranty.<sup>4</sup>

The inquiry whether the applicant for a life insurance had been "afflicted with pulmonary complaints or consumption," being answered in the negative, he being himself sensible at the same time that he had for some months been affected by tubercular consumption, it was held in Massachusetts that, whether the misstatement was made purposely or unwittingly, the representation was falsified, and the policy made void, though he replied to another inquiry, that he had been troubled with general debility.<sup>5</sup> It was stipulated in this case that "the application formed a part of the policy, and if in any respect untrue, and if there was any misrepresentation" in it, the policy should be void, but the effect of the misrepresentation would, it seems, have been the same without this stipulation.

The fact that the proposed life is in prison for debt is not nec-

<sup>1</sup> *Lindenau v. Desborough*, 8 Barnew. & C. 586; *Edwards v. Barrow*, Ellis' Ins. 116.

<sup>2</sup> *Vose v. Eagle L. Ins. Co.* 6 Cush. Mass. 42.

<sup>3</sup> *Marshall*, Ins book 3, note at the end of chapter 2.

<sup>4</sup> *Ross v. Bradshaw*, 1 W. Blackst. 312.

<sup>5</sup> *Vose v. Eagle L. Ins. Co.* 6 Cush. Mass. 42.



essarily material; whether it is so or not depends upon the particular circumstances, and is a question for the jury. If it is material, it must be stated, though there is no inquiry put specifically calling for the fact.<sup>1</sup>

648. *An inquiry must be truly answered according to the object in making it*, and the answer should be definite and full.

Thus, to the inquiry for "the usual medical attendant" of the life, the answer should state the one who is best able to give an account of the constitution and health of the proposed life at the time though he may not at the time be the attendant, another having recently been called;<sup>2</sup>

If one has recently attended in severe illness, he must be named.<sup>3</sup>

If the life is subject to incipient insanity, or mental imbecility, this must be communicated.<sup>4</sup>

Where the applicant produced to the insurers two favorable certificates of a physician who had examined the subject of a life policy in December and in the March following, and a physician had attended the subject in the mean time, which was not mentioned to the company, a verdict having been given for the holder of the policy, the court ordered a new trial, that the question might be submitted to the jury whether this was a case of concealment, the court seeming to be inclined to consider it to be such.<sup>5</sup>

The question being, Has the party been "afflicted with" or "subject to" fits? the omitting to mention two such of epilepsy long before caused by an accident, was considered not to be a concealment; though under the question "Has he ever had fits?" it might have been a concealment.<sup>6</sup>

The assured represented, in the reply to interrogatories, that he had not any spitting of blood. It appeared that he had spit blood, and it was held that he was bound to have communicated

<sup>1</sup> *Huguenin v. Bailey*, 6 Taunt. 186. Carr. & P. 353; S. C. 3 Barnew. & C.

<sup>2</sup> *Huckman v. Fiernie*, 3 Mees. & W. 586; *Swete v. Fairlie*, 6 Carr. & P. 1. Exch. 505.

<sup>5</sup> *Morrison v. Muspratt*, 4 Bingh.

<sup>3</sup> *Maynard v. Rhodes*, 1 Carr. & P. 60.

360.

<sup>6</sup> *Chattock v. Shaw*, 1 Mood. & R.

<sup>4</sup> *Von Lindenau v. Desborough*, 4 498.

that fact, so that the insurers might judge whether it amounted to the disease of spitting blood.<sup>1</sup>

649. Under a provision that the policy shall be void in case of "any untrue averment" by the assured in his answers, it is made void by such an averment, though the assured supposed it to be true.<sup>2</sup>

650. *An oral misrepresentation in reply to an oral inquiry will render a life policy void*, no less than a communication in writing ;

As where a false reply was given to the inquiry whether previous application had been made to any other office.<sup>3</sup>

651. *In case of a misrepresentation and concealment, the policy is void, though the decease of the life is not in the least owing to the circumstance misrepresented or concealed.*

It was so ruled, where the name of the attending physician, and the diseases for which he had prescribed, were suppressed ;<sup>4</sup> and where the applicant described himself as "a farmer" when he was a slave catcher.<sup>5</sup>

652. *A mere opinion*, expressed as such, if it be honestly expressed, *is not a representation* in a life insurance of the fact supposed, any more than in a marine one.<sup>6</sup>

653. *The assured may, by the terms of the policy, make himself responsible for the truth of the representations of other persons.*

Where a life policy bore a condition that the declarations made in reply to certain questions proposed by the office should "be considered the basis of the contract" of insurance, and that, if such declarations were not in all respects true, the policy should be void, a misrepresentation, in respect to any such subject of inquiry, of any material fact, was held to avoid the policy, not only on the ground of a breach of condition, but also as a mis-

<sup>1</sup> Geach v. Ingall, 14 Mees. & W. Exch. 95.

<sup>2</sup> Duckett v. Williams, 2 Crompt. & M. Exch. 348; 4 Tyrw. 240; Cazenove v. British, &c. Ass. Co. 6 C. B. N. S. 437; and see cases supra, No. 647.

<sup>3</sup> Wainwright v. Bland, 1 Mees. & W. Exch. 32; 1 Tyrw. & G. 417.

<sup>4</sup> Maynard v. Rhodes, 1 Carr. & P. 360.

<sup>5</sup> Hartman v. Keystone Ins. Co. 21 Penn. St. 466.

<sup>6</sup> The assured stated all the facts having a tendency to affect his life; held that the omission of others, in the belief they had no such tendency, did not avoid the policy. Jones v. Provincial Ins. Co. 3 C. B. N. S. 65.

representation; that is, a representation of a third person, taken with the knowledge of the assured, either actual or presumed, and in pursuance of the directions given on the back of the policy in this respect, would have the same effect in defeating the policy as if made by the assured himself. Where a policy on a life required, among other things, a statement of the name and residence of the attending physician of the life insured, and provided, that, if any declaration made on this, as well as the other subjects of inquiry, were not in all respects true, the policy should be void, it was held that a misrepresentation, by the person whose life was insured, of the name of his attending physician, defeated the policy, though the subject of the policy had no interest whatever in the insurance, and the assured had no intention to deceive the underwriters, and did not know that any misrepresentation was made.<sup>1</sup>

654. *If a third person, whose statements are produced by the assured, or made at his suggestion, or known to him, culpably conceals or misrepresents material facts, this renders the insurance void, though it contains no provision directly and expressly making the assured responsible for the truth and fairness of the statements.*

This doctrine applies especially to statements made by the person whose life is insured by another.

In the negotiation, in May and June, for two policies in favor of an annuity creditor on the life of the debtor, the latter, on examination by the insurers, replied to the inquiry, "Who is your medical attendant?" "I have none but Mr. G." He had formerly been attended by Mr. G., but not within three years. He had during the preceding February and March been attended by a physician, and also by a surgeon, for inflammation of the liver, fever, and determination of blood to the head. Abbott, C. J., instructed the jury, that this misrepresentation made the policy void.<sup>2</sup>

The Chief Justice is reported to have remarked that the applicant "allowed" the party to make this representation; he must

<sup>1</sup> Everett v. Desborough, 5 Bingh. 503. See also Huckman v. Fernie, 1

Horn & H. 149; Duckett v. Williams, 2 Carr. & M. 348; Maynard v. Rhodes, 2 Carr. & P. 360.

<sup>2</sup> Mood. & R. 328; 1 Carr. & P. 360.

<sup>2</sup> Maynard v. Rhodes, 1 Carr. & P. 360.

accordingly have known of its being made. It does not, however, appear whether the creditor knew it to be a misrepresentation. It has the appearance of being fraudulently intended by the party examined.

To a similar question put to the wife, in a negotiation for a policy in favor of her husband, she gave the name of the family physician of her husband, who had casually prescribed for her once, or possibly twice, during the ten previous months since her marriage to the applicant, but had not attended her professionally, and the occasion and the prescription were of so little importance that he had made no memorandum of it in his book. She had previously been attended for a number of years by another physician, and treated for dangerous delirium tremens, and an erysipelatous inflammation of the legs. She had, previously to her marriage to the applicant, applied to two other companies for insurance on her life, and referred to her former physician, both of which declined to insure her. A verdict having been given for the assured, Lord Abinger and his associates, in the Court of Exchequer, granted a new trial, on the ground that this was a misrepresentation, and that her attending physician, within the meaning and intention of the question, was the one who had attended her previously to her marriage.<sup>1</sup>

In this case the husband sent the wife to the board of directors of the company for examination, and so probably knew what answers she had made. The jury found that the husband did not know of her having had the delirium tremens and erysipelas. The answer seems to have been considered by the court to have been fraudulently given by the wife.

A subsequent decision of the English Court of King's Bench coincides with the preceding. In the negotiation for an insurance in favor of A on the life of B, the latter appeared at the office of the insurers for examinations. He omitted to state that he was in the habit of intemperance. It was insisted that he was under these circumstances the agent of the assured, to whom his concealment of this fact was imputable. Lord Denman, C. J., in instructing the jury, remarked that the life could not be considered the general agent of the assured, and that the doc-

<sup>1</sup> *Huckman v. Fernie*, 3 Mees. & W. Exch. 505.



trine that the assured were responsible for his acts was greatly overstrained by the defendant's counsel. "He is to answer all questions put to him, and if he answers falsely, that will vitiate the policy. But the mere non-communication of his habits of life by the party whose life was insured, would not itself vitiate the policy.<sup>1</sup>

The doctrine just stated accords with that already laid down relative to commercial insurance.<sup>2</sup>

655. *If the third person whose statement is offered or procured by the assured, or at his suggestion, makes a misrepresentation of, or omits to communicate a material fact, without fraud or fault, but through oversight or forgetfulness, it will render the policy void if the assured himself or his agent for effecting the insurance knew of the misrepresentation or concealment, or had good reason to suspect it; otherwise it will not render the policy void, if it is a case of mere incidental aggravation of the risk, which answers to the description in the policy, and is substantially the risk understood by the parties. But if the circumstance thus inadvertently misrepresented or omitted goes essentially and fundamentally to the contract, the case is one in which the minds of the parties have not met, and the contract is void and a subject for relief, on the ground that it is not the one in contemplation of the parties.*

Decisions have been made which apparently do not agree with the doctrine just stated.

Lord Lyndhurst ruled that where a party effects a policy on the life of another, whose statement is produced to the insurers, if the statement is materially erroneous in making the risk appear less than it really is, this renders the policy void, though the party making the statement supposed it to be true.<sup>3</sup>

<sup>1</sup> Rawlins v. Desborough, 2 Mood. & R. 328. See also the elaborate note by the reporters in this case, in which the decisions on the responsibility of the assured for the misrepresentations and non-representations of third persons are examined and commented upon.

Lord Tenterden and his associates may have applied this doctrine in one case to an omission of a material fact

in a certificate by a physician; it does not distinctly appear whether it was considered to be an intentional and fraudulent omission or not. Von Lindenau v. Desborough, 3 Carr. & P. 353; 8 Barnew. & C. 586. See also Rawls v. American L. Ins. Co. 27 N. Y. 282.

<sup>2</sup> Supra, s. 1, No. 549.

<sup>3</sup> Duckett v. Williams, 2 Crompt. & M. 348; 4 Tyrwh. 240. But in such a

Under the general inquiry as to any other material circumstances than those stated in reply to the particular inquiries, Lord Tenterden intimated to the jury, that an omission by a foreign physician, whose certificate had been produced, to state under this general inquiry decided symptoms of insanity or mental imbecility, rendered the policy void.<sup>1</sup>

This may, however, have been considered a case of intentional, fraudulent concealment, by the foreign physician, as another physician, examined as a witness at the trial, said, that in like circumstances he should have deemed it to be his duty to mention the mental infirmity. But the decision is not put distinctly upon that ground. There appears to have been no reason for imputing to the assured a knowledge of the uncommunicated fact.

The ruling of Lord Denman, C. J., in a case before cited,<sup>2</sup> agrees directly with the proposition just laid down.

656. *If the person referred to by the assured or his agent, for information concerning the risk, answers fairly the inquiries put to him, this in general suffices; he is not required to volunteer any statement of circumstances not inquired about, unless it is evident to him, from the apparent object of the inquiries made, that some analogous circumstance within his knowledge was material and important to be communicated. In such case, the suppression of the circumstance would evidently be dishonest, and betray a fraudulent intent.*<sup>3</sup>

The case can, however, rarely occur, since the examination usually includes some general question, which would require a statement of any material fact within the recollection of the party examined.

657. *The validity of an insurance by a creditor or other party*

case the physician is not the agent of the party to whom the policy is payable. *Wheelton v. Hardisty*, 8 Ell. & B. 232.

<sup>1</sup> *Von Lindenau v. Desborough*, 3 Carr. & P. 253. And this ruling was approved by Justices Bayley and Little-  
dale, 8 Barnew. & C. 586.

<sup>2</sup> *Rawlins v. Desborough*, 2 Mood. & R. 328.

<sup>3</sup> This proposition is in a close analogy to the cases cited in the text rel-

ative to fraudulent suppressions and representations, and is directly laid down by Lord Denman in *Rawlins v. Desborough*, 2 Mood. & R. 328. On this ground where the assured described himself as Esquire when he had no commission as justice of the peace, the court held there was no material misrepresentation. *Perrins v. Marine, &c.* Ins. Co. 2 Ell. & E. 317.

interested in another's life, *is not affected by the omission of the party whose life is insured to state*, in reply to interrogatories, a fact in his own experience of which he was himself not conscious, and of which he had not been informed by others :

As where he had been in a state of incipient insanity without being conscious or informed of it.<sup>1</sup>

658. The statements as to the habits of the assured are not promissory representations.<sup>2</sup>

A condition for revival of a forfeited policy if the assured is in good health, means in as good health as at the date of the policy.<sup>3</sup>

#### SECTION XVII. PRESUMPTION FROM THE RATE OF PREMIUM.

659. *The rate of premium has been considered a circumstance of some importance in determining whether a fair representation has been made.*

If the risk appears to have been known by the assured, at the time of insuring, to be extraordinary, and yet only the ordinary premium for the voyage was given, it affords some presumption, of more or less weight, against the fairness of the representation.<sup>4</sup>

Upon the same principle, an extraordinary premium is the ground of presuming that the risk was represented to be extraordinary.<sup>5</sup>

It is not, however, to be inferred from the high rate of premium merely, that a concealed or misrepresented fact was to be at the risk of the insurers.

<sup>1</sup> Swete v. Fairlie, 6 Carr. & P. 1.

<sup>4</sup> Bridges v. Hunter, 1 Maule & S.

<sup>2</sup> Reichard v. Manhattan Ins. Co. 31 Mo. 518.

<sup>5</sup> Freeland v. Glover, 7 East, 457.

<sup>3</sup> Peacock v. New York Ins. Co. 1 Bosw. N. Y. 338.

<sup>6</sup> Per Lord Tenterden, Von Lindennau v. Desborough, 3 Carr. & P. 353.

SECTION XVIII. THE WITHDRAWING, SUPERSEDING, OR WAIVER  
OF A REPRESENTATION.

660. *An express warranty or stipulation including a fact represented, or inconsistent with it, will control and supersede the representation, since the written agreement, so far as its express provisions extend, is conclusive proof of the conditions on which the contract is made.*

A ship being insured "to all or any ports or places" beyond the Cape of Good Hope, it was alleged that the assured had represented that she was going "to Pondicherry and China." Lord Mansfield and the other judges held, that any such representation was superseded by the description of the voyage in the policy.<sup>1</sup>

If the policy be made in behalf of "whom it may concern," the underwriter cannot object that he was not informed who were interested, for by subscribing the policy he has agreed to insure any one who may be lawfully interested.

In the case of a policy of this description made in New York, the person who effected it resided there, but one of the part-owners resided in Curaçoa, at that time a belligerent colony. It was insisted that this fact ought to have been disclosed. Mr. Justice Kent said, "The insurers took upon themselves the risk of the property, whether belligerent or neutral."<sup>2</sup>

Where the voyage, as represented in the proposal for insurance, was not worth so high a premium by five or six per cent. as that on which the ship actually sailed, yet this representation was waived by the description of the voyage in the policy.<sup>3</sup>

In the case of a policy on the "Spanish brig New Constitution," the description imported and warranted that the brig was in fact Spanish; it availed nothing that the underwriters knew she was only "ostensibly" Spanish, for it was agreed in the written instrument what her national character should be.<sup>4</sup>

<sup>1</sup> Bize v. Fletcher, 1 Dougl. 271.

<sup>4</sup> Atherton v. Brown, 14 Mass. 152.

<sup>2</sup> Elting v. Scott, 2 Johns. N. Y. 157. See also Pickering v. Dowson, 4 Taunt.

<sup>3</sup> Vandervoort v. Smith, 2 Caines, N. Y. 155.



661. *But there is a distinction in this respect between an express and an implied stipulation or warranty.*

It has already appeared, that the assured must make true answers to inquiries relating to the subject of an implied warranty, which would be futile unless the contract were to be affected by the representations made in reply to such inquiries. "As far as a representation extends," says Mr. Justice Platt, "an implied warranty ceases."<sup>1</sup>

662. *A prior representation may be superseded or impliedly withdrawn by a subsequent one stating the circumstances differently, or stating new circumstances.* This proposition is involved in many of the cases stated in the present chapter.

663. The question, whether a usage is controlled by a representation, or will supersede it, seems to depend in some degree upon another, namely, whether a usage, and the course of the trade, are to be considered as equivalent to an express part of the policy. If the construction be, as Lord Mansfield said, the same "as if the point of usage were inserted in the contract in terms,"<sup>2</sup> then it should seem, if his observation is to be adopted in its strict and literal meaning, that the assured will be bound by the usage, though he may have represented to the insurers that he intended to depart from it. But Lord Mansfield was speaking of a case where there was no representation as to the point of usage, and to apply his remark to any other case might be forcing it beyond the sense in which it was intended. It appears by some cases, that *the obligation from a usage may be qualified and restrained by a representation, but only in such manner that the necessary and plain import of the words of the policy shall remain unimpaired.*

Thus, where the captain was limited by his orders to one out of three courses of the voyage, when it was the usage to leave it to the discretion of the captain to choose either course at the dividing point, the judges said the orders "ought to have been communicated to the underwriters;" if "disclosed" to them, "they would perhaps have required a larger premium, or not have subscribed;"<sup>3</sup> by which it seems to be implied, that a

<sup>1</sup> *Walden v. N. Y. Firemen's Ins. Co.*  
<sup>12</sup> *Johns. N. Y.* 128.

<sup>3</sup> *Middlewood v. Blakes*, 7 Term,  
162.

<sup>2</sup> *Mason v. Skurry, Park, Ins.* 191.

representation of the fact that the captain was limited to one course would have given the assured a right to recover for a loss; neither of the judges said any thing of inserting the circumstance of the orders in the policy.

664. *The neglecting to make inquiries may be a waiver of information.* As by neglect to object that one question on the printed form of application is not answered.<sup>1</sup>

Instances have occurred in the preceding cases, where the insurer, by omitting to inquire respecting circumstances relating to the seaworthiness of the ship, the national character of the property, and its character as contraband of war or not, and respecting the time of the vessel's sailing, has been held, by so doing, to have waived any information concerning facts, in respect to which the assured is not required in the first instance to make any disclosure.

665. *So a representation may be such as to put the insurer on inquiry if he wishes to learn other facts; and if he neglects to make inquiry, he is precluded from objecting on the ground of concealment.*

Where a letter from the master, then on the coast of Africa, acting instead of one who had been killed, was exhibited, saying, "The natives, finding us weak-handed, do as they please. I have nine men on board now. I made mention of the ivory, palm-oil, &c., in my last letter. I do not expect to get all my wood till the latter part of next month, when you may expect my sailing." The insurers objected to the non-production of the previous letter referred to in this, in which divers disasters were mentioned. Lord Ellenborough and his associates, considering that this letter disclosed that there was a previous letter, that the vessel had been long on the coast, and had lost part of the men, and was in circumstances very unfavorable for the risk, were of opinion that the insurers were put upon inquiry for further particulars, if they wished to learn them, and that the assured was not bound to make any further disclosures in the first instance.<sup>2</sup>

666. *If a fact stated or promissory representation ceases to be*

<sup>1</sup> *Liberty Hall Ass'n v. Housatonic* Blake v. Exchange Ins. Co. 12 id. Ins. Co. 7 Gray, Mass. 261. See also 265.

<sup>2</sup> *Freeland v. Glover*, 7 East, 457.

*material, in consequence of an entire change of circumstances, before the risk commences, it needs not to be verified.*

As where it relates to a belligerent peril, and peace intervenes.<sup>1</sup> The same would be true of a concealment.

667. *The assured may, at any time before the policy is signed, withdraw a representation previously made,*<sup>2</sup> by giving the underwriters explicitly to understand, that he was mistaken in regard to the facts represented, or that he will not be held to a compliance with what he had verbally promised.

Lord Ellenborough ruled, that the assured virtually withdrew a representation made by him at the time of signing the slip, by making another and different representation at the time of signing the policy. He said, "The first conversation was qualified and controlled by what followed."<sup>3</sup>

Mr. Justice Woodbury is reported to have ruled that a misrepresentation was cancelled by a correction made after the policy had gone into effect and before any loss had happened,<sup>4</sup> but the ruling, no doubt, had reference to some act of the underwriters or their silence, whereby they signified their acquiescence in the correction.

Whether an agent's knowledge of a material fact will exonerate the applicant from the obligation to communicate it, will depend upon his authority to represent the insurers in this respect.<sup>5</sup>

Where the agent of a life insurance company, who was not authorized to agree for insurance, knew of the falsity of a material representation by an applicant, this was held not to cancel the misrepresentation.<sup>6</sup>

A concealment is cancelled by the fact, which is not stated by the assured, being known to the underwriter, as appears by the definition of concealment.<sup>7</sup>

668. *The forfeiture, by reason of a misrepresentation or concealment, may be waived by the insurers :*

<sup>1</sup> 2 Duer, Mar. Ins. 702.

<sup>2</sup> Carter v. Boehm, 3 Burr. 1905.

<sup>3</sup> Edwards v. Footner, 1 Campb. 530.

<sup>4</sup> Nicoll v. Am. Ins. Co. 3 Woodb. & M., C. C. 529; Prieger v. Exchange Ins. Co. 6 Wisc. 89.

<sup>5</sup> See No. 1872, 1876, 1878.

<sup>6</sup> Vose v. Eagle Life and Health Ins. Co. 6 Cush. Mass. 42. See also Chase v. Hamilton Ins. Co. 20 N. Y. 52; Smith v. Ins. Co. 24 Penn. St. 320.

<sup>7</sup> Supra, No. 531.

As by receiving a new premium on a fire policy, after the misrepresentation is known: <sup>1</sup>

Or by offering to rebuild under a clause authorizing that mode of payment: <sup>2</sup>

Or by renewal of the policy. <sup>3</sup>

#### SECTION XIX. COMPLIANCE WITH A REPRESENTATION.

669. *It is sufficient that a representation is equitably and substantially complied with, and not requisite that the facts should be literally as they are stated.* <sup>4</sup>

If the existing facts or intelligence, on which the representation is made, are on the whole as favorable to the risk as they were represented to be, and correspond in general to the representation, the insurers have no ground of complaint, though the statement was not literally and minutely correct.

Where it was represented that the vessel would sail in ballast, but the captain, without the owner's knowledge, took on board a cask of shoes, and ten barrels of gunpowder, Kent, C. J., said: "The representation of sailing in ballast was merely stating that the vessel would not be exposed to the sea-perils attending a loaded ship, and was substantially performed." <sup>5</sup>

It being represented that the vessel would sail with twelve guns and twenty men, she sailed with nine carriage guns and six swivels, and fourteen men and seven boys. Boys were considered to be men within the description in the representation, and as the force appeared to be equivalent to that represented, though not the same, the contract was held to be valid. <sup>6</sup>

670. *A literal, in contradistinction to a substantial, compliance is not sufficient.*

It being represented that a ship would "sail as soon as the

<sup>1</sup> Allen v. Vermont Mut. Fire Ins. Co. 12 Vt. 366.

<sup>2</sup> Bersche v. Globe Ins. Co. 31 Mo. 546; Same v. St. Louis Ins. Co. ib. 555.

<sup>3</sup> Witherell v. Maine Ins. Co. 49 Me. 200.

<sup>4</sup> De Hahn v. Hartley, 1 Term, 343; 2 Term, 186.

<sup>5</sup> Suckley v. Delafield, 2 Caines, N. Y. 222.

<sup>6</sup> Pawson v. Watson, Cowp. 785; 1

Dougl. 12, n.



frigates, calculating to take advantage of their protection," and she sailed before them; this was held not to be a compliance with the representation.<sup>1</sup>

671. *Property represented to be of any particular national character, or neutral, must be owned and documented, and accompanied by the proper insignia as such, and the evidence of the character represented must be ready to be produced.*<sup>2</sup>

A vessel, French built, was represented to be owned by American citizens, and to have on board an original bill of sale, or an attested copy of it, and such a bill of sale was on board, but on the ship's being captured was not produced, and the captain, on his examination before the Admiralty Court at Halifax, denied that he had any such bill of sale on board. It was held, that the representation was material, and had not been complied with. Kent, J., said: "It would be absurd to suppose that the bill of sale on board, in a concealed situation, and never to be used, fulfilled the intention of the parties."<sup>3</sup>

A representation that a ship was neutral, was held in New York to be "equivalent to a warranty,"<sup>4</sup> and it accordingly requires that it should be owned, documented, and navigated, in conformity with the representation.

672. *Whether a representation that a ship is or was to sail on, or before, or not until after, a certain day, must be strictly complied with, or is, like representations generally, satisfied by a substantial compliance?*

If the policy is "at and from" a place named, and the vessel is hindered from sailing by a peril by which the underwriter is not to be directly or indirectly affected, as, for instance, by some voluntary act of the assured himself, the contract is forfeited; but not so if the hinderance is by some casualty that may be presumed to have been in contemplation of the parties as an exception; especially and conclusively, if it is by the perils insured against.

Such a representation in a policy "from" a port is most obvi-

<sup>1</sup> *Alsop v. Coit*, 12 Mass. 40. See also remarks per Shaw, C. J., in *Houghton v. Manufacturers' Mut. Fire Ins. Co.* 8 Mete. Mass. 114.

<sup>2</sup> *Dawson v. Atty* 7 East, 367.

<sup>3</sup> *Murray v. Alsop*, 3 Johns. Cas. N. Y. 47. See *The Bernon*, 1 C. Rob. Adm. 103.

<sup>4</sup> *Vandenheuvel v. Church*, 2 Johns. Cas. N. Y. 173, n.

ously construed to be, that the vessel will be, or was, ready to sail on the day named; and her being then ready is a substantial, if not a strict compliance, though she may have been hindered by the state of the weather, or other simultaneous, temporary casualty; but if by any prior casualty which in such case is at the risk of the assured, or any act imputable to the assured whether simultaneous or prior, the contract will be defeated. That is to say,

*If the vessel is hindered from sailing on the stipulated day by any cause, simultaneous or prior, for which the assured is exclusively responsible, the contract is either forfeited or defeated; the former if the risk had commenced, the latter if it had not.*<sup>1</sup>

*A positive, unqualified representation that the vessel did sail, or will sail, on a certain day, must, if material, be complied with.*

673. *In a case of a written promissory representation, referred to in the policy as a representation, a substantial compliance is sufficient.*

A substantial compliance with a representation that a factory is examined every day after work, and a cask of water and buckets are kept in each story, is sufficient. An occasional omission to examine the mill, happening by accident or the negligence of subordinate persons or workmen, not sanctioned by the assured or his superintendent, manager, or agent, might not amount to a non-compliance. So, respecting the keeping of a cask of water, that a cistern or reservoir of sufficient capacity would be a compliance, though it was not a cask, and the keeping of a small, insufficient cask would not be a compliance, though literally it corresponded to the representation.<sup>2</sup>

Under a condition of a fire policy on a china-factory, that, if an assured should describe it otherwise than as it really was, so that it should be insured at a less premium, the policy should be void, a room described as a "store for painted ware," on the plan shown to the insurers, was in fact occupied as the carpenter's shop for the establishment. The rate of premium was the same for either use. This was held to be a sufficient compliance.<sup>3</sup>

<sup>1</sup> See 2 Duer, Mar. Ins. 686, Lect. 14, iels v. Hudson R. Ins. Co. 12 Cush. s. 29. Mass. 416.

<sup>2</sup> Houghton v. Manufacturers' Mut. Fire Ins. Co. 8 Metc. Mass. 114; Dan-  
<sup>3</sup> Delonguemere v. Tradesmen's Ins. Co. 2 Hall, N. Y. 589.

Where a portion of the building insured as a grist-mill was occupied partly as a carpenter's shop in which work other than repairs of the mill was done, it was held that the policy was void, the risk being enhanced by such use.<sup>1</sup>

Under the same condition, the building was represented to be "a stone mill covered with wood." The gables were wood. This was held not to be a misrepresentation, if the rate of premium would not be thereby enhanced.<sup>2</sup>

So where a building described as "occupied as a hotel," was used by the tenant as a house of ill fame; this was held not to defeat the insurance.<sup>3</sup>

But having a cooper's shop in a building described as a flour-mill was held to be not a compliance with the representation.<sup>4</sup>

674. *A written representation may be referred to in the policy in such a manner, or may be of such a matter, as to require as strict a conformity of the facts to the statement, and compliance, as if it were an express, specific warranty in the policy.*

Where a policy stipulates that it is to be void in case of the facts stated in the written application being untrue, and one of the facts required is a specification of other buildings within a given distance from the one insured, an omission to mention a building situated within that distance will render the policy void, without any distinction as to its enhancing the risk or not.<sup>5</sup>

This case is put partly upon the fact of the reference in the policy, but many statements might be true within the meaning of such a reference, though not literally verified. In this case, the only room for construction and qualification of the statement seems to be the determining of what is a "building" within the meaning of the policy. Any structure within the specified distance, being considered to be a "building," insurmountably falsifies the statement, which is made material by its being an

<sup>1</sup> Jennings v. Chenango Mut. Ins. Co.  
<sup>2</sup> Den. N. Y. 75.

<sup>2</sup> Columbian Ins. Co. v. Lawrence, 2  
Pet. 25.

<sup>3</sup> Hall v. People's Ins. Co. 6 Gray,  
Mass. 185.

<sup>4</sup> Harris v. Columbiana Ins. Co. 4  
Ohio St. 285.

<sup>5</sup> Burritt v. Saratoga County Mut.  
Fire Ins. Co. 5 Hill, N. Y. 188.

answer to an inquiry respecting a specific fact. In case of some general representation, as of neutrality, the distinction between a substantial and a strict compliance, if there is any, is hardly appreciable. In such cases a warranty and a representation are substantially equivalents, though the representation is not referred to in the policy.

Lord Ellenborough makes a distinction between a warranty and a representation of neutrality, in respect of the strictness of the compliance requisite, but it seems to have been merely for a plausible way of escaping the doctrine of the conclusiveness of a French decree of condemnation.<sup>1</sup>

SECTION XX. EFFECT OF A CONCEALMENT OR MISREPRESENTATION.

675. *One of the implied stipulations by the assured, on which the underwriter subscribes, is, that he is informed by the assured of all material circumstances known to the latter, and not known, or presumed to be so, to himself, and that no misrepresentation has been made by, or is imputable to, the assured; and if this stipulation is not substantially complied with, he is wholly or partially exonerated from the liabilities to which he would otherwise have been subject.*

676. *The insurance will be defeated in full or in part, as the case may be, whether the past or existing circumstances misrepresented or suppressed, eventually turn out favorably or unfavorably for the risk.*

The whole question, as the definitions already given import, is, whether, if the fact suppressed had been communicated, or the fact misrepresented had not been represented, or had been represented truly, the tendency would have been to influence the mind of the underwriter to decline to subscribe, or to demand a higher premium. If such would have been the tendency, then the subscription is in effect cancelled, unless the presumption that the insurer was thereby influenced is counter-  
 vailed.<sup>2</sup>

1 Von Tungeln v. Debois, 2 Campb. 151. Anon. Skin. 327; Seaman v. Fonnerau, 2 Strange, 1183.

<sup>2</sup> Willes v. Glover, 4 Bos. & P. 14;



A broker, knowing that a ship, having on board a part of the goods insured, was reported to have been seen at sea "deep and leaky," did not disclose this information to the underwriters, which defeated the contract, though in fact the ship was not deeply laden or leaky.<sup>1</sup>

677. *In case the misrepresentation or concealment has reference to past or existing circumstances, the underwriter is discharged from all liability in respect of the subject or risks to which the misrepresentation or suppression relates.*

This doctrine is constantly assumed, and runs through the whole jurisprudence on the subject.

678. *If a fact suppressed relates to only a part of the goods or subjects insured, but yet enhances the risk on the whole, it is a concealment in respect of the whole :*

As where a part of the insured cargo is of a belligerent character, thereby exposing the whole to detention.<sup>2</sup>

679. *Whether a concealment or misrepresentation respecting one of two or more subjects, or a part of a subject, insured in a policy, but not affecting the other part or other subjects, is such in reference to these, the case being free of fraud ?*

In the case above cited,<sup>3</sup> Mr. Justice Washington gave as a reason for a concealment as to a part of the cargo being such in reference to the remainder, that the risk upon the whole was enhanced by the suppressed fact. Conversely, therefore, applying the same criterion, if the suppressed fact does not enhance the risk on the remainder of the cargo, or on the other subjects insured in the policy, it will remain in force upon these. And I am not aware of any objection to this doctrine, provided there is no insuperable obstacle to its practical application.

According to divers decisions and dicta in the former jurisprudence, the insurance of the whole of the subjects, or all the different subjects, for a single premium, or under one valuation, might be considered as presenting an objection, but as there is not in fact, usually, if there is ever, any difficulty in apportioning a premium to divers subjects or parts of a subject, any more than in reference to different periods or passages, I persuade myself

<sup>1</sup> *Lynch v. Dunsford*, 14 East, 494 ;  
*Lynch v. Hamilton*, 3 Taunt. 37.

<sup>2</sup> *Marshal v. Union Ins. Co.* 2 Wash. C. C. 357.

<sup>3</sup> *Ibid.*

that this objection will cease, if it has not ceased already, to have any weight. But suppose the premium not to be apportionable, the result is merely that the assured is subject to an excessive rate of premium, which is preferable to what is often the alternative, namely, the losing of the whole of it for a part of the period of the risk at least. The better doctrine in the case put, accordingly, seems to me to be, that

*The policy remains valid in reference to the other subjects or other parts of the same subject, where different subjects or parts are specifically distinguishable.*<sup>1</sup>

680. *Whether a misrepresentation or concealment in respect of one of the risks insured against, and not affecting the others, where the loss by such risk is clearly distinguishable, will defeat the policy in reference to the other risks, the case being free of fraud?*

In accordance to the doctrine before stated, I agree with Mr. Duer,<sup>2</sup> following Benecke, that *the policy ought to be held valid in reference to the other risks.*

This, and the similar doctrines before just stated, will be found to be directly, not to say conclusively, supported by the juridical jurisprudence on implied warranties, in reference to risks that are clearly distinguishable from the others insured against.

681. *Whether the assured, in order to excuse an alleged non-compliance with a representation, is permitted to prove that a material misrepresentation or concealment did not influence the underwriter?*

Where the jury found that a representation did not influence the underwriter, Lord Tenterden and his associates considered it to be neutralized, and put upon the footing of an immaterial fact.<sup>3</sup>

There does not seem to be any case in which this could be proved, except that of a revocation of the representation on the

<sup>1</sup> This is the position taken in *Lochner v. Home Ins. Co.* 17 Mo. 247. But in *Friesmuth v. Agawam Ins. Co.* 10 Cush. Mass. 587, and *Brown v. People's Ins. Co.* 11 Cush. Mass. 280, where the representation was a matter of express stipulation, and the underwriters had a

lien for the premium, the court held that the contract was entire and no such division could be made.

<sup>2</sup> 2 Duer, *Marine Ins.* 599.

<sup>3</sup> *Flinn v. Headlam*, 9 Barnew. & C. 693.

part of the assured, or a waiver of its materiality on the part of the underwriter. Neither of these grounds appears in the case referred to. In that case the underwriter at first declined to subscribe, on the ground that the vessel was to carry a cargo of rock-salt. The assured represented that she would carry only enough to put her in ballast trim, whereupon the underwriter subscribed. She in fact carried a full cargo. To cancel this representation, a certificate, procured at the suggestion of the brokers at whose office the policy was underwritten, that she was strong, stiff, staunch, seaworthy, and fit to carry a cargo of rock-salt, was proved. This could cancel the representation only on the ground that it was immaterial whether the particular vessel carried a full cargo of salt, or only enough to put her in ballast trim. But the case admits that the representation was material, that is, that it made a difference. It is possible that the underwriter waived his objection on his attention being called to the certificate, but the report does not show this.

Notwithstanding this decision, I conclude that *a material misrepresentation will defeat the policy*, wholly or in part, *unless it is withdrawn by the assured, or its materiality is waived by the insurer, or it becomes immaterial, or compliance with it is rendered illegal.*

682. The non-communication or *misrepresentation* of material facts, though it be *through mistake* or forgetfulness, and without any fraudulent purpose, *has nevertheless the effect to defeat the contract.*<sup>1</sup>

683. *Whether, in a retrospective insurance, a concealment or misrepresentation of what occurred subsequent to the time from which the risk purports to be assumed by the policy will defeat it?*

A decision by Lord Ellenborough and his associates has reference to the question just stated. It was an insurance in London, on a ship, "lost or not lost, at and from the port of loading in Jamaica" to the United Kingdom; the ship having been heard from at her loading port, Manchineal, in that island. The captain omitted to mention in his letter received by the owner before he effected the insurance, that the ship had been driven upon a rock in that harbor, and had been got off without having apparently sustained material damage.

<sup>1</sup> Bridges v. Hunter, 1 Maule & S. 15.

Here the policy purported that the insurers assumed the risk from a time anterior to the accident. The alternative, therefore, seemed to be, that the insurers must be liable for the damage sustained from the time of the vessel's arrival at Manchineal, or be discharged from the policy entirely. The court considered the non-communication of the fact of the accident as a material concealment; without, however, any imputation of fraud, either to the assured or the master. But instead of assigning the ordinary effect to the concealment, by holding that it wholly defeated the policy, they held that it had the effect to exonerate the underwriters from liability for the damage occasioned by the accident. Lord Ellenborough remarks, "If the principle be new, it is consistent with justice and convenience."<sup>1</sup> It subsequently appeared, on a survey after arrival at London, that she had, by the accident, sustained damage to keel and other parts, amounting to fifteen per cent.

Assuming, with the court, the fact to be material, and the obligation of the assured to communicate it, and considering that it affected the whole risk for the whole voyage, the conclusion seems to follow, that

*The policy was void.*

684. *A non-compliance with a promissory representation subsequently to both the time of making the policy and the commencement of the risk, does not render the policy void, but, like a deviation, discharges the insurers, at the most, only from liability for any subsequent loss, and leaves them liable to prior losses.*

This results necessarily from the fact that the underwriters are by all policies liable for the payment of the loss in a certain time after demand and proof, which time may have expired before the non-compliance.

685. *Whether temporary non-compliance with a representation subsequently to the commencement of the risk, will discharge the insurers absolutely?*

Where a representation has a continuing character, or refers to circumstances subsequent to the commencement of the risk, there is no precedent or principle against the revival of the risk, after its temporary suspension by a temporary non-compliance with the representation without fraud, provided such temporary

<sup>1</sup> Gladstone v. King, 1 Maule & S. 35.



non-compliance has no effect in enhancing or changing the subsequent perils. Analogy to the doctrine relative to temporary non-compliance with the implied warranty of seaworthiness, is a ground of confident inference that *the underwriters are not absolutely discharged* by such non-compliance, *but*, on the contrary, that, *in such case, the risk revives after the non-compliance ceases.*<sup>1</sup>

<sup>1</sup> See 2 Duer, Ins. 697 ; 1 Arnould, Ins. 525.

## CHAPTER VIII.

### IMPLIED WARRANTIES, CONDITIONS, AND STIPULATIONS.

SECT. 1. What warranties, conditions, and stipulations are implied.  
2. Seaworthiness of the ship.  
3. Legal conduct.

SECT. 4. Belligerent risks.  
5. The abrogation of an implied warranty, condition, or stipulation.

#### SECTION I. WHAT WARRANTIES, CONDITIONS, AND STIPULATIONS ARE IMPLIED.

686. *An implied warranty, condition, or stipulation, is an agreement not expressed in the policy, but presumed from the fact of making the insurance.*

It is distinguished from a representation by the circumstance, that the latter is usually expressed, either in writing or verbally, or is the result of the phraseology used, and does not arise on the mere fact of effecting the policy.

687. The doctrine of misrepresentation and concealment involves the principle of an implied warranty or condition; they avoid the policy because *there is an implied agreement of the assured to make a fair disclosure of the circumstances affecting the risk*, and the insurer subscribes upon the condition that he has complied with this agreement.

688. So it has been held to be an implied condition that interests of a certain description must be disclosed, either in the policy or otherwise.

The interest of a lender on bottomry or respondentia, as we have seen, must be insured as such.<sup>1</sup>

So the other kinds of interest, such as belligerent or contraband, of which, as before stated, notice to the underwriter is requisite, must be specified in the policy, if notice of them is not otherwise given.

It has been held by the Supreme Court of the United States,

<sup>1</sup> *Supra*, No. 427.

that the same condition is applicable to a policy on the interest of a mortgagee ; of which it is that "no policy can be deemed a policy exclusively upon the interest of the mortgagee, unless the company has notice that it is so designed."<sup>1</sup> But the decisions in reference to the description of the subject,<sup>2</sup> the ruling of Tindal, C. J., and others of the English Common Pleas,<sup>3</sup> have quite a contrary aspect, and go to the doctrine that such an interest need not be described in the policy, or disclosed by representation. This is in conformity to the liberal spirit of commercial jurisprudence introduced by Lord Mansfield, and more prevalent recently both in England and the United States, discountenancing and tending to discard superfluous conditions and distinctions.

689. The doctrine of deviation, to be hereafter more particularly considered, is founded on *an implied understanding* between the parties, arising on the fact of making the insurance, *that the adventure is to be pursued in the usual manner*, or, in other words, that the risks are to be such as vessels are usually subject to, and not voluntarily varied by the assured or those whose acts and neglects are imputable to him.

690. Upon the same principle upon which the doctrine of deviation is founded, *it is an implied understanding that the risk is to commence within a reasonable time*, unless the policy contains some express provision on the subject ; and unless it is so commenced, the contract will be forfeited.

A policy was effected in London, on freight at and from Singapore and Batavia to London, dated on the 28th of February, 1824. The ship had sailed from England on the outward voyage in September, 1823. Owing to delays, partly unnecessary, on the outward voyage, the ship did not arrive at Singapore until the 30th of March, 1825, and sailed thence on the 3d of May following. Tindal, C. J.: "We are of opinion that such unreasonable and unjustifiable delay, on the part of the assured, in commencing the voyage, is in the nature of a deviation, and does amount to such an alteration of the risk insured against, as to discharge the underwriter. He has as much right to calculate upon the outward voyage being performed in a reasonable time and without unnecessary delay, in order that the risk may attach,

<sup>1</sup> Per Story, J., 16 Pet 495, at p. 505, in *Carpenter v. Providence Washington Ins. Co.*

<sup>2</sup> *Supra*, No. 421, 422.

<sup>3</sup> *Pim v. Reid*, 6 Mann. & G. 1.

as that the voyage insured shall be commenced within a reasonable time after the risk has attached. In either case the effect is the same as to the underwriter, who has another risk substituted instead of that which he has insured against.”<sup>1</sup>

A decision similar in principle was made in case of a charter-party, where the owner did not have the ship at the place agreed upon in reasonable time.<sup>2</sup> The doctrine is general.

691. *It is always implied that no indemnity is to be made for loss, by the specified perils, on property held in contravention of law, or employed in an illegal adventure or use, or for loss incurred by the illegal acts of the assured.*<sup>3</sup>

It has been sometimes stated to be an implied warranty, that the assured shall comply with the laws in the prosecution of the adventure;<sup>4</sup> but this is too broad a statement of the doctrine, as already remarked, for the policy is not forfeited by an incidental, collateral, illegal act.<sup>5</sup>

692. *It is also, as will subsequently more fully appear, an implied understanding of the parties to the policy, that the underwriters are not liable for loss occasioned by the perils insured against, in direct, obvious, and necessary consequence of the unjustifiable acts or neglects of the assured or of the agents for whose conduct he is responsible. The extent of his responsibility is a subject of inquiry under the head of Risks, and that of Agents.*

693. *It is an understood condition of every policy, that if the assured proves to have no insurable interest in the subject described, or if the subject is never liable to the risks insured against, the policy is to be cancelled, and in the absence of fraud on the part of the applicant, the premium is to be returned.*

694. *The implied warranties which most frequently come into discussion are those of the seaworthiness of the ship and the neutral character, and the neutral and legal conducting of the adventure.*

<sup>1</sup> Mount v. Larkins, 8 Bingh. 108. establishing the doctrine of Mount v. Mr. Chief Justice Tindal cites and comments upon Smith v. Surridge, 4 Esp. 25; Hartly v. Buggin, Park, Ins. 523; Vallance v. Dewar, 1 Campb. 503; Ougier v. Jennings, 1 Campb. 505, n.; and Hull v. Cooper, 14 East, 479; as

<sup>2</sup> Freeman v. Taylor, 8 Bingh. 124.

<sup>3</sup> See chap. 3, sec. 2.

<sup>4</sup> Per Tindal, C. B., in Sadler v. Dixon, 8 Mees. & W. Exch. 895.

<sup>5</sup> See chap. 3, sec. 2.



## SECTION II. SEAWORTHINESS OF THE SHIP.

695. *In a marine insurance, whether it be on the ship, freight, or cargo, or the commissions or profits to accrue upon the cargo, the assured is understood impliedly to warrant, by the mere fact of effecting the insurance, independently of the particular terms used, that the ship is at the commencement of the voyage seaworthy; namely, that the materials of which the ship is made, its construction, the qualifications of the captain, the number and description of the crew, the tackle, sails, and rigging, stores, equipment, and outfit, generally, are such as to render it in every respect fit for the proposed voyage or service.*<sup>1</sup>

A similar warranty is implied in river, lake, and canal navigation.<sup>2</sup>

696. *If the ship, owing to some material deficiency, other than a merely incidental one, temporary in character and admitting of a ready remedy,<sup>3</sup> is not, or was not at the time referred to by the warranty, such as the assured is understood, by effecting the policy, to warrant, the condition on which the liability of the underwriter wholly or partially depends is forfeited.*

697. *This warranty extends to the qualities and defects of the vessel, unknown, and that could not have been known, no less than those known, to the assured.*<sup>4</sup>

698. *This or any other implied obligation may be modified, enlarged, or superseded by express agreement :*

As where it is provided that any insufficiency of the ship, not known to the assured, shall not prejudice the insurance :<sup>5</sup>

So where by the policy the ship is "admitted to be seaworthy

<sup>1</sup> Lee v. Beach, Park, 342; Marsh. 160; Oliver v. Cowley, Park, 343; Marsh. 161; Warren v. United Ins. Co. 2 Johns. N. Y. 231; Prescott v. Union Ins. Co. 1 Whart. Penn. 399. The warranty extends to the machinery of a steamboat; Myers v. Girard Ins. Co. 26 Penn. St. 192. This warranty is implied where salvors insure their salvage in a vessel sent to another port;

Knill v. Hooper, 2 Hurlst. & N. Exch. 277.

<sup>2</sup> Firemen's Ins. Co. v. May, 20 Ohio, 211.

<sup>3</sup> See infra, No. 726.

<sup>4</sup> M'Cargo v. Merchants' Ins. Co. 10 Rob. La. R. 334; and see cases generally.

<sup>5</sup> Vallejo v. Wheeler, Cowp. 143.

for the voyage,"<sup>1</sup> in case of damage and the ship not being worth repairing, the underwriters are precluded from alleging its decayed state in defence against a claim for loss.

A mutual insurance company cannot by a vote add an implied condition to a policy previously issued to one of its members.<sup>2</sup>

The policy being on the "good ship" H, this designation is not an express or implied warranty of seaworthiness.<sup>3</sup>

699. *Where the risk commences under the policy at the original port of departure, a compliance with this implied warranty is generally a condition precedent on which the fact of the policy's attaching depends.* This doctrine pervades the whole jurisprudence on the subject.<sup>4</sup>

700. *To render a ship seaworthy, it must be staunch and of sound materials; or rather, it must be sufficiently staunch and sound for the service or use intended by the insurance.*<sup>5</sup>

A ship, of which "the timbers were decayed and the iron-work wrought loose," was considered not to be seaworthy.<sup>6</sup>

701. *The ship must be adequately constructed.*

A vessel constructed without knees was held not to be seaworthy for a foreign voyage.<sup>7</sup>

The question occurred in Pennsylvania, whether the want of cabin-doors, for which sliders had been substituted, and the want of a tarpauling covering of the hatches, make a vessel unsuitable for the navigation of Lake Erie. Tilghman, C. J., seemed to be of opinion, that these circumstances did not make the vessel unfit for this service.<sup>8</sup>

<sup>1</sup> Parfitt v. Thompson, 13 Mees. & W. 392; Phillips v. Nairne, 1 Arnould, Ins. 662; S. C. 16 Law Jurist, Com. Pl. 194.

<sup>2</sup> New England Mut. Fire Ins. Co. v. Butler, 34 Me. 451, cited supra, No. 413 a.

<sup>3</sup> Per Parke, B., Small v. Gibson, 16 Ad. & E. 141, 3 Eng. L. & Eq. 299.

<sup>4</sup> See Mills v. Roebuck, Park, 335; Berman v. Woodbridge, 2 Dougl. 781; Watson v. Clark, 1 Dow, Parl. Cas. 344; Hucks v. Thornton, 1 Holt, 30;

Garrigues v. Cox, 1 Binn. Penn. 592; Patrick v. Hallett, 1 Johns. N. Y. 241; Peters v. Phoenix Ins. Co. 3 Serg. & R. Penn. 25; Plantamour v. Staples, 1 Term, 611, n.; 3 Dougl. 1.

<sup>5</sup> Bullard v. Roger Williams Ins. Co. 1 Curt. C. C. 148.

<sup>6</sup> Douglas v. Scougall, 4 Dow, Parl. Cas. 269.

<sup>7</sup> Watt v. Morris, 1 Dow, Parl. Cas. 32.

<sup>8</sup> Bell v. Reed, 4 Binn. Penn. 127.

In case of a vessel's being run upon a rock in going out of Boston harbor, in consequence of the needle of the compass being drawn out of its direction two or three points by an iron fastening near the compass, which defect could easily be remedied, the insurers objected to paying the loss, on the ground that it rendered the vessel unseaworthy. It appeared by the testimony of sundry witnesses, that, notwithstanding the utmost care on the part of the owners and master, iron-work will sometimes come so near to the compass as to cause a variation, and there being no negligence in this case, the court seemed to acquiesce in the opinion of the witnesses, that the circumstance did not render the vessel unseaworthy.<sup>1</sup>

702. *The ship must be sufficiently furnished with sails, tackle, rigging, cables, and anchors.*

A vessel was considered not to be seaworthy, of which "the maintop-gallant-sail and studding-sails were extremely rotten and unserviceable," in consequence of which deficiency she fell behind the convoy and was lost.<sup>2</sup>

So a vessel was considered to be unseaworthy, of which the best bower anchor and the cable of the small bower were defective.<sup>3</sup>

703. *Sufficient stores and supplies are requisite to seaworthiness.*

A vessel not properly supplied with fuel and candles was held not to be seaworthy.<sup>4</sup>

If a medicine-chest is a part of the usual outfit for the voyage insured, it is questionable whether the ship is seaworthy without one.<sup>5</sup>

The outfit must be such as is requisite for the voyage and season.

A voyage in a northern climate in the winter, for instance, requires a different outfit for the accommodation of the crew from what is necessary in the warm season, or for a southern voyage.<sup>6</sup>

<sup>1</sup> Stanwood v. Rich, S. J. C. Mass. Suffolk, November, 1817.

<sup>2</sup> Wedderburn v. Bell, 1 Campb. 1.

<sup>3</sup> Wilkie v. Geddes, 3 Dow, Parl. Cas. 60.

<sup>4</sup> Fontaine v. Phœnix Ins. Co. 10 Johns. N. Y. 58.

<sup>5</sup> Woolf v. Claggett, 3 Esp. 257.

<sup>6</sup> Watt v. Morris, 1 Dow, Parl. Cas. 32.

What is a proper outfit to make the ship seaworthy for a voyage depends very much upon usage.

We have already seen that a contravention of law in some collateral incidental transaction in the course of the voyage, does not defeat the policy.<sup>1</sup> So, in respect of the outfit of the ship, a non-compliance with the law in some particular, as in a foreign voyage from Mansanilla to the United States, not having under deck the quantity of water required by an act of Congress,<sup>2</sup> was held not to vitiate the policy on the vessel, the quantity of water on board, and manner of stowing it on deck, being in conformity with the usage in the voyage.<sup>3</sup>

704. The *proper stowage* of the cargo, and spare sails, rigging, tackle, and necessary furniture of the vessel, *is requisite* to seaworthiness, so far that it must conform to the usage of the trade to all practical purposes material to the risk, and must not materially and continuedly embarrass the navigation and endanger the safety of the vessel.<sup>4</sup>

A case before cited<sup>5</sup> recognizes the force of usage, as to the stowage of supplies.

Underwriters were held not to be liable for the loss of a hawser stowed in the boat on deck, thus assuming that proper stowage is necessary, though the question of seaworthiness was not made in the case.<sup>6</sup>

705. The vessel must not be overloaded, whether in marine,<sup>7</sup> or in river, lake, or canal navigation.<sup>8</sup>

706. *Insufficiency of ballast renders the vessel unseaworthy.*<sup>9</sup>

707. *It is requisite that the ship should have a competent master and officers, according to the service upon which it is employed.*<sup>10</sup>

<sup>1</sup> Supra, No. 221; Clark v. Protection Ins. Co. 1 Stor. C. C. 109.

<sup>2</sup> 1790, c. 56, s. 9, edited by Story, Vol. 1, p. 106.

<sup>3</sup> Warren v. Manufacturers' Ins. Co. 13 Pick. Mass. 518.

<sup>4</sup> Chase v. Eagle Ins. Co. 5 Pick. Mass. 51.

<sup>5</sup> Warren v. Manufacturers' Ins. Co. 18 Pick. Mass. 518.

<sup>6</sup> Brooks v. Oriental Ins. Co. 7 Pick. Mass. 259; and see Roccus de Assec. n. 22.

<sup>7</sup> Weir v. Aberdeen, 2 Barnw. & Ald. 320.

<sup>8</sup> Firemen's Ins. Co. v. May, 20 Ohio, 211.

<sup>9</sup> Deblois v. Ocean Ins. Co. 16 Pick. Mass. 303; Dixon v. Sadler, 5 Mees. & W. Exch. 414; Sadler v. Dixon, 8 id. 895.

<sup>10</sup> Walden v. Fire & Mar. Ins. Co. 12 Johns. N. Y. 128. Incompetency of the master named in the registry and shipping articles as a navigator is not a breach of warranty, if a competent sail-



The English Court of King's Bench was inclined to hold a vessel not to be seaworthy, the captain of which, for a voyage within the Straits of Gibraltar as far up us Tarragona, from ignorance of the coast, mistook Barcelona for Tarragona.<sup>1</sup>

708. *The skill in navigation of the master or other persons on board, requisite to seaworthiness, must depend upon the particular voyage.*

Lord Tenterden was of opinion, that a ship was not seaworthy for a voyage from Madras to London, having no one on board capable of navigating her, excepting the captain.<sup>2</sup>

Whether the master or some one on board must have sufficient skill to take an observation, depends upon the voyage and the usage of the particular trade.<sup>3</sup>

709. *It is essential, that a sufficient crew should be provided at the commencement of the voyage.*<sup>4</sup>

A vessel of about thirty-five or forty tons burden, with three sails, was considered not to be seaworthy for a voyage from New York to Edenton, in South Carolina, with no other crew than the master and one seaman.<sup>5</sup>

A ship engaged on a whaling and sealing voyage, and having a letter of marque, was insured from a certain date, at which time she had a sufficient crew for sealing and other purposes of the voyage, except whale-fishing; and she afterwards pursued only sealing. Gibbs, C. J.: "If the ship had a competent crew to pursue any part of her adventure, it being at her election to pursue what part she chose, she might be deemed seaworthy."<sup>6</sup>

710. *It is generally, though not in all cases, requisite that a sufficient crew for the whole voyage should be shipped at the outset.*

The question whether the original shipment of a full complement of men for the whole voyage or period of the risk is necessary to seaworthiness, like other questions relative to this subject, depends upon usage and the particular voyage, and circumstances.

ing master has entire charge. Draper v. Commercial Ins. Co. 21 N. Y. 378; reversing the decision below. 4 Du. N. Y. 234.

<sup>1</sup> Tait v. Levi, 14 East, 481.

<sup>2</sup> Clifford v. Hunter, 3 Carr. & P. 16; 1 Mood. & M. 103.

<sup>3</sup> Treadwell v. United Ins. Co. 6 Cow. N. Y. 270.

<sup>4</sup> Busk v. Royal Exch. Ass. Co. 2 Barnw. & Ald. 73.

<sup>5</sup> Dow v. Smith, 1 Caines, N. Y. 32. See Hunter v. Potts, Selw. N. P. 907, n.

<sup>6</sup> Hucks v. Thornton, 1 Holt, 30.

The commencement of the voyage being down the Plaquimin River, in North Carolina, the Supreme Court of New York were of opinion, from the evidence, that one man, with the captain, was sufficient for descending the river, though two were requisite for the rest of the voyage to New York.<sup>1</sup>

The degree of probability, amounting almost to certainty in many cases, that hands may be had at ports where the ship is to touch, will materially affect the question.

For these reasons, I have stated the doctrine as above, that it is "generally" requisite to have a sufficient crew shipped, and that the vessel shall be otherwise seaworthy for the whole voyage, at the outset, notwithstanding that a part of the navigation requires fewer hands, or the voyage includes stopping at intermediate ports.<sup>2</sup>

Under a policy on goods from Wilmington, in North Carolina, to Falmouth, in England, a part of the crew were shipped for New York, at which port it was proposed to touch on the voyage, and a loss occurred, and the ship foundered, before coming to the dividing point of the course direct to Falmouth and that to New York. It was held in New York, that the underwriters were exonerated, on the ground of unseaworthiness.<sup>3</sup>

It was remarked in this case, by Mr. Justice Kent, that "the master was under a moral disability to go to Falmouth, and this was equivalent to a physical incompetency to perform the voyage." But if the ship had not foundered, the master might have obtained the consent of the men so shipped to go to Falmouth, or he might have broken his agreement with those men, which, though wrong, would have been a matter *inter alios* in reference to the parties to the policy. The decision does not accord to the rule that we shall find to be adopted in respect of deviation.

A ship and cargo were insured "at and from" the loading port in Cuba, to Liverpool, with liberty, "in that voyage, to proceed and sail to, and touch and stay at, any ports and places whatever." The vessel had made an outward passage from Liverpool, and, some of the crew having been lost by sickness

<sup>1</sup> *Treadwell v. Union Ins. Co.* 6 Cow. N. Y. 270.

<sup>3</sup> *Silva v. Low*, 1 Johns. Cas. N. Y. 198.

<sup>2</sup> *Alexander v. Pratt*, 1 Arnould, Ins., part 2, c. 4, sub. s. 248, p. 670.

before leaving Cuba, the master, not being able to find others there to supply all their places, shipped two for Jamaica, and put in at Montego Bay to land those two and ship two others. The vessel was held, by three of the judges of the English Common Pleas, namely, Dallas, Park, and Burrough, to be unseaworthy, though Park, J., said he had changed his opinion since coming into court. Richardson, J., withheld his opinion on this question.<sup>1</sup>

Mr. Justice Washington also assumes the same doctrine as to an equal strictness of compliance with this warranty, whether the risk under the policy begins at a foreign or other home port.<sup>2</sup>

The correctness of the decision of the English Common Pleas is very questionable, whether examined by the jurisprudence of England or that of the United States, on two grounds: namely, that, as the policy was at and from the loading port, and some of the hands were lost there, the master was authorized to take whatever measures were necessary to supply the deficiency, without forfeiting the insurance;<sup>3</sup> and, second, that, as the voyage had been out and home, though the risk commenced at the foreign port, the warranty of seaworthiness was not subject to the same strictness of construction in reference to that port, as in reference to the port of departure on the outward voyage.<sup>4</sup>

711. *If a sufficient crew is originally shipped, an occasional disability, absence, or deficiency of the men, does not violate this warranty.*<sup>5</sup> But as the warranty continues during the voyage, it is broken by leaving any port on the voyage with an insufficient crew, and the impossibility of procuring a crew is held to be no excuse.<sup>6</sup>

712. *When a vessel is on ground where it is usual to take a pilot, a professional pilot, or some person on board who has adequate knowledge and skill in the local navigation to direct the course, is necessary to seaworthiness, just as a competent master, and officers, and a sufficient crew, are so in general.*

1 Forshaw v. Chabert, 3 Brod. & B. 158.

2 Cruder v. Philadelphia Ins. Co. 2 Wash. C. C. 262.

3 Ibid.; Motteux v. London Ass. Co. 1 Atk. Ch. 545; Smith v. Surridge, 4 Esp. 25; and other cases cited infra.

4 See infra, No. 728.

5 Per Bailey, J., Busk v. Royal Exch. Ass. Co. 2 Barnew. & Ald. 73. See also Bishop v. Pentland, 7 Barnew. & C. 219; 1 Mann. & R. 49.

6 The Gentleman, Olcott, Adm. 110.

The pilots appointed by authority are presumed to be competent, and if such a one is taken, and the vessel is left to his guidance, this warranty is satisfied.<sup>1</sup>

It is true, that, if such a pilot is at the time grossly unfit to be intrusted with the navigation of the vessel, for instance, by intoxication, criminal intent, or vicious or malignant perverseness, it may be the duty of the master, as in other emergencies, to exercise his discretion as to the course and management of the vessel. The usual, and ordinarily more prudent course, is to permit the vessel to be conducted by the pilot. At any rate, the warranty of seaworthiness is satisfied by his being on board, and the question that arises, if any, in case of the interposition of the master in conducting the vessel, is not that of unseaworthiness for want of a pilot.

713. *If the vessel is piloted by the master or other person on board, of competent skill, into or out of port, or over any pilot ground, the warranty of seaworthiness is satisfied, though he is not a publicly authorized pilot.*

In such case the competency is not, as in that of a publicly authorized pilot, presumed, but must be proved.<sup>2</sup>

714. *If a person representing himself, and believed by the master, to be a qualified pilot, is taken, the warranty of seaworthiness is satisfied, though he is in fact not qualified.*<sup>3</sup>

715. *As the master can always obtain a pilot, where it is usual to take one, in going out of a harbor, the vessel will not be seaworthy without one.*<sup>4</sup>

It was so ruled, even where the pilot refused to pilot a vessel out immediately, on account of the difficulty of getting back, it being afternoon, in the state of the weather at the time.<sup>5</sup>

716. *If, on arriving off a port, on signal given, or waiting a reasonable time according to the circumstances, no pilot offers,*

<sup>1</sup> *Law v. Hollingsworth*, 7 Term, 160.

<sup>3</sup> So implied in *Law v. Hollingsworth*, 7 Term, 160.

<sup>2</sup> *Keeler v. Firemen's Ins. Co.* 3 Hill, N. Y. 250; *Flanigen v. Washington Ins. Co.* 7 Penn 307; *M'Millan v. Union Ins. Co.* Rice, So. C. 249. In *Whitney v. Ocean Ins. Co.* 14 La. 485, it was held that the vessel is not seaworthy without an authorized pilot, though the master is a good pilot.

<sup>4</sup> *Phillips v. Headlam*, 2 Barnw. & Ad. 380.

<sup>5</sup> Per Parker, C. J., *Stanwood v. Rich*, Mass. Sup. Ct. Suffolk, November, 1817.



*the captain may, as in other emergencies, use his discretion as to standing off or entering without a pilot, and his doing the latter will not be a breach of this warranty.*<sup>1</sup>

717. *Whether the vessel is unseaworthy by not taking a pilot, where there is a provision of law for pilotage?*

In a case before Lord Kenyon, and Justices Grose and Lawrence,<sup>2</sup> the decision, holding the underwriters to be discharged by the vessel not having a pilot, was put wholly upon the ground of unseaworthiness, though the loss, by running upon the anchor of another vessel in the Thames, was not owing to want of a pilot. Tindal, C. J., remarks upon that case, that the decision, if it can be supported at all, must be so on the ground of non-compliance with the act of Parliament respecting pilotage in the Thames.

Assuming that the neglect to take a pilot, or rather his being discharged before the vessel was safely moored in that case, was by mistake of the master, in an intermediate stage of the voyage, according to the English jurisprudence, if the vessel is rendered unseaworthy through such mistake after the risk has once commenced, and loss by perils of the sea supervenes in consequence or independently of such mistake, the underwriters still remain liable for the loss, notwithstanding such defect of seaworthiness, unless they can defend themselves from liability on the ground of contravention of law by the master.<sup>3</sup>

This is impliedly assuming that, if a statute requires the master to take a pilot, the underwriters are discharged from their liability during the neglect to comply with the law. This is in accordance to some other decisions of the English courts in similar cases, already stated.<sup>4</sup> But the better doctrine seems to be, that the underwriters are not discharged from their liability for a loss, even though consequent upon the neglect, since by familiar principle and practice a contract of indemnity against the illegal acts of others, as loss by barratry, by pirates, and by incendiaries, is valid. Consequently, a contravention of law by a mistake of the master is not distinguished in this respect from any other mistake of the master in navigating the vessel.

<sup>1</sup> Phillips v. Headlam, 2 Barnew. & Ad. 380; Van Syckel v. The Ewing, Crabbe, Dist. Ct. 405.

<sup>3</sup> Sadler v. Dixon, 8 Mees. & W. Exch. 895.

<sup>4</sup> Supra, No. 712, 713, 714, 715.

<sup>2</sup> Law v. Hollingsworth, 7 Term, 160.

A law providing for pilotage does not necessarily prohibit the master from standing pilot. Whether it does so is matter of construction. The mere imposing of a liability to pay a fee to the first pilot who offers himself, though his services are not accepted, is not necessarily such a prohibition, being in its character a tax to support a system of pilotage.

Supposing the law, however, to directly prohibit the master from standing pilot, if a licensed pilot can be had, his doing so will be a contravention of law; but this is, to say the least, a questionable ground of defence against a claim for even a consequent loss, and certainly not a good ground against one for a loss merely subsequent to and not consequent upon such neglect. The defence in such case, if any, must be, not unseaworthiness, but that the risk is not covered, as where the act is barratrous and that risk is not insured against.

I accordingly conclude that

*A contravention of the pilotage law by the master's neglect to take a pilot, with or without the concurrence of the ship-owner or other assured, does not necessarily discharge the underwriters.*

718. *Leave given in the policy for the master to stand pilot in certain parts of the voyage, does not amount to a condition that he shall not stand pilot in other parts for which his competency is proved.*<sup>1</sup>

719. *The warranty of seaworthiness varies in different places; a vessel considered seaworthy for a voyage in one place may not be so considered in another; the standard of seaworthiness also varies from time to time in the same place.*

*This warranty requires seaworthiness in conformity with the standard at the time, for the contemplated service, at the port to which the vessel belongs, unless some other standard is referred to expressly or by implication.*

Under a policy underwritten in Boston on property on board of a vessel belonging to Halifax, in Nova Scotia, on a voyage from Bahia, in South America, to that port, Mr. Justice Story remarked, that "the standard of seaworthiness had been gradually raised in many places within the preceding thirty years." He ruled that the underwriter "must be presumed to underwrite upon the ground that the vessel shall be seaworthy in her equip-

<sup>1</sup> Keeler v. Firemen's Ins. Co. 3 Hill, N. Y. 250.

ments, according to the general custom of the port, or at least of the country, to which she belongs.”<sup>1</sup>

720. *The requisites to seaworthiness depend upon the intended use and service of the vessel. The requisites to satisfy this warranty for lying in port, or for temporary purposes, short coasting passages, or navigating a lake, river, or canal, are different from those demanded for navigating the open sea on long voyages.*<sup>2</sup>

If the risk comprehends the time while a vessel is in port, this warranty will be satisfied, though she needs repairs.

Insurance was made on a vessel lying at Pillau, where she was delayed more than a month for repairs. The insurers objected to paying a loss, on the ground that the vessel was not seaworthy. Lord Kenyon instructed the jury, that the vessel need not be seaworthy for the voyage immediately. The insurers took the risk of this.<sup>3</sup>

The ship *Eyles*, being insured at and from Fort St. George to London, not being in a fit condition to undertake the voyage, was unloaded at Fort St. George, and went to Bengal for the purpose of obtaining repairs. Being repaired, she returned and took her cargo for the homeward voyage. Lord Hardwicke held that the risk commenced from the time of the vessel's first arrival at Fort St. George, and that she was seaworthy. He said, “If she went to the nearest place, he should consider it equally the same as if she had been repaired at the very place from which the voyage was to commence.”<sup>4</sup> The objection made by the insurers was upon the ground of a deviation, but the decision implies an opinion on the seaworthiness of the vessel.

Lord Ellenborough: “While a vessel remains at a place, a state of repairs and equipment may be sufficient, which would constitute unseaworthiness after the commencement of the voyage. But she must be in such a condition as to be in

<sup>1</sup> *Tidmarsh v. Washington Ins. Co.* 4 Mas. C. C. 439; and see *American Ins. Co. v. Ogden*, 20 Wend. N. Y. 287; per *Walworth*, C. p. 295.

<sup>2</sup> *M'Lanahan v. Universal Ins. Co.* 1 Pet. 170; *Annen v. Woodman*, 3 Taunt. 299; *Small v. Gibson*, 16 Ad. & E. 128, 141, 3 Eng. L. & Eq. 290, 299; *Gibson v. Small*, 4 Hou. L. Cas. 353, 24 Eng.

L. & Eq. 16; *Alexander v. Pratt*, 1 Arnould, Mar. Ins. 669, n. (a), 672, n. (k); *Bell v. Reed*, 4 Binn. Penn. 127; *Oliverson v. Loughman*, cited 2 Barnew. & Ald. 322.

<sup>3</sup> *Smith v. Surridge*, 4 Esp. 25.

<sup>4</sup> *Motteux v. London Ass. Co.* 1 Atk. Ch. 545.

reasonable security. If she be a mere wreck, the policy never attaches." <sup>1</sup>

The circumstance by which a breach of this warranty is ascertained, says Mr. Justice Sewall, "to the effect of avoiding the policy, is the sailing of the vessel in an innavigable state. Until then there is an opportunity of curing the latent defects if they should be discovered, and their mere existence, while not prejudicial or material to the risk insured, is not a forfeiture of the contract." <sup>2</sup>

It is uniformly assumed\* that there is some stipulation as to the condition of the vessel in port; as by Sewall, J., <sup>3</sup> by Lord Kenyon, <sup>4</sup> Lord Ellenborough, <sup>5</sup> Gibbs, C. J., <sup>6</sup> Mr. Justice Washington, <sup>7</sup> and Mr. C. J. Shaw. <sup>8</sup>

721. As to the *character and degree of seaworthiness* requisite to satisfy this warranty on the vessel while *in port*, in a Massachusetts case in 1807, on a premium note, <sup>9</sup> it was held that this warranty was complied with, under a policy upon the ship, cargo, and freight, at and from Calcutta, while the vessel lay in that port, though her bottom was so much worm-eaten that she leaked badly on going to sea, and the master, after being out a month on his voyage to the United States, was obliged to put back to Calcutta, and land his cargo and make repairs. The sailing in such a condition was held to be non-compliance with the warranty.

This decision was confirmed in a subsequent case, twenty-four years afterwards, in the same court, in a suit on the premium note for a policy on cargo and freight, at and from Vera Cruz. <sup>10</sup>

<sup>1</sup> *Parmeter v. Cousins*, 2 Campb. 235. See *Hibbert v. Martin*, Park, Ins. 8th ed. 472; *S. C.* 1 Campb. 538; *Annen v. Woodman*, 3 Taunt. 299; *Cruder v. Pennsylvania Ins. Co.* 2 Wash. C. C. 262, 339; *Taylor v. Lowell*, 3 Mass. 331; *Brown v. Girard*, 4 Yeates, Penn. 115; *Weir v. Aberdeen*, 2 Barnew. & Ald. 329; *Oliverson v. Loughman*, cited 2 Barnew. & Ald. 322; *Forbes v. Wilson*, Park, 344.

<sup>2</sup> *Taylor v. Lowell*, 3 Mass. 331.

<sup>3</sup> *Taylor v. Lowell*, ut supra.

<sup>4</sup> *Smith v. Surridge*, 4 Esp. 25.

<sup>5</sup> *Parmeter v. Cousins*, 2 Campb. 235.

<sup>6</sup> *Abithol v. Bristow*, 6 Taunt. 464.

<sup>7</sup> 1 Pet. C. C. 110.

<sup>8</sup> *Paddock v. Franklin Ins. Co.* 11 Pick. Mass. 227.

<sup>9</sup> *Taylor v. Lowell*, 3 Mass. 331.

<sup>10</sup> *Merchants' Ins. Co. v. Clapp*, 11 Pick. Mass. 56. One ground assigned for adhering to the decision was, that



The degree of seaworthiness requisite in port under a policy upon the ship cannot be specified more definitely than it has been by Mr. Chief Justice Shaw, who says :

*Seaworthiness depends upon the uses and purposes to which the vessel is to be applied. While a vessel is insured at a port, she must be in such a condition as to be in reasonable security.*<sup>1</sup>

722. It follows, if we apply the same criterion, that *there may be a compliance with this warranty in a policy on the ship, while lying in port, and not in one upon the cargo* of the same ship, for circumstances may be readily imagined and often occur, in which the vessel is in reasonable security in port though goods on board would not be so. The risk of perils of the sea to the cargo does not usually commence, and the insurable interest in freight often does not accrue, until the vessel has been some time in port. A policy on freight and cargo may, therefore, and often does, attach subsequently to that on the ship, under a policy "at" a port.

723. *There are then two distinctions in the insurance on the ship, and that on cargo and freight, first in respect of what is seaworthiness in port, and, second, as to the time when the policy attaches ;* and these two distinctions have place, though all these interests are insured in the same policy, made, or having reference to the time, before the cargo is on board.

"The seaworthiness of the ship depends upon the uses and purpose to which it is applied." When this use is to load and stow the cargo for the voyage, and the vessel is in such a state of repair that it is necessary to reland the cargo for the purpose of making repairs, the ship is not fit for the use to which it is applied. There is, therefore, a non-compliance with this warranty simultaneous with the loading of the cargo.

The risk, in one of the two Massachusetts cases above referred

its correctness had not been called in question in the mean time. This does not, however, seem to be of great weight, where the objection, as was urged in the case, is inconsistency with admitted fundamental principles, since it is, in such a case, an adhering to an inconsistency and contradiction, and tends to reduce jurisprudence from a

science to an aggregation of dogmas. In such a case it is better presumed that contracts are made and executed on the supposition that a proper decision will be made when the question comes up again.

<sup>1</sup> Paddock v. Franklin Ins. Co. 11 Pick. Mass. 227.

to,<sup>1</sup> had commenced on the ship before the non-compliance with the warranty of seaworthiness, whereas under the insurance on the cargo, and perhaps on the freight, the non-compliance was at the time when the risk was to commence, and so prevented the policy from attaching upon one or both of those interests. The non-compliance was accordingly at an intermediate stage of the risk, which, as we shall see, makes a material difference as to its effect.<sup>2</sup>

There was nothing to prevent the risk from attaching on the cargo and on the freight when the vessel had returned and had been repaired and made navigable, and the cargo was put on board the second time.

The court held, in the case last referred to, that the underwriters were not liable for loss consequent on the defect of the vessel, which was, in effect, holding that the warranty had not been complied with.

The distinction is made, as to the commencement of the risk under the policy before or after the unseaworthiness occurs, in a case in the Circuit Court of the United States. Under a policy upon goods "at and from" St. Lucia, by a vessel of which the mate and one man were lost at that port, Mr. Justice Washington said, that, if they were lost before the goods were on board, the policy did not attach at all; if after the loss of the men, then it had attached, and had not been forfeited by the vessel's going to St. Barts for men.<sup>3</sup>

I conclude accordingly, that,

*Under a policy upon cargo and freight, the warranty of seaworthiness is not complied with, if the cargo is put on board for the voyage when the ship is in so defective a state that the cargo must be relanded in order to make the necessary repairs, and the policy, therefore, does not attach on the cargo if the risk is to commence at the time of loading.*

I understand the doctrines of *Taylor v. Lowell* to be favored at least, if not fully sustained, by the subsequent jurisprudence in England and the United States, excepting on the point of the risk commencing on the cargo and freight at the first time of loading the cargo. There are other points in that case to be

<sup>1</sup> *Taylor v. Lowell*, 3 Mass. 331.

<sup>2</sup> *Infra*, No. 727.

<sup>3</sup> *Cruder v. Philadelphia Ins. Co.* 2 Wash. C. C. 262.

subsequently noticed, which render it one of the landmarks in this branch of commercial jurisprudence.

724. *The seaworthiness of a vessel at the outset, being a condition precedent, must be proved by the assured in the first instance.*<sup>1</sup>

In divers cases, seaworthiness is said to be presumed.<sup>2</sup>

Whether, however, it is to be proved in the first instance by the assured, or is presumed, is usually of very little practical importance, since the proof required in such case is necessarily only of a general character, and may ordinarily be readily had.

725. *If the vessel proves to be leaky or defective, or becomes disabled soon after the time to which this warranty has reference, when there can evidently have been no intervening injury, it is inferred that the unseaworthiness existed previously.*<sup>3</sup>

As where the vessel sprung a leak and filled the day after the sailing, without any accident having happened to it.<sup>4</sup>

So if the vessel has encountered a storm, but it appears that the defects discovered could not have been caused thereby, and must have existed before sailing, the warranty is falsified.<sup>5</sup>

726. It has been before stated,<sup>6</sup> that the liability of the underwriter depends "wholly or partially" upon compliance with this warranty, when the risk under the policy commences at the orig-

<sup>1</sup> *Craig v. United States Ins. Co.* 1 Pet. C. C. 410, per Washington, J.; per Lord Eldon, in *Watson v. Clark*, 1 Dow, Parl. Cas. 144; *Munro v. Vandam*, Park, Ins. 469, 8th ed.; *Tidmarsh v. Washington Fire & Mar. Ins. Co.* 4 Mas. C. C. 439.

<sup>2</sup> *Taylor v. Lowell*, 3 Mass. 331; per Sewall, J. p. 347; *Deshon v. Merchants' Ins. Co.* 11 Metc. Mass. 199; per Hubbard, J.; *Parker v. Potts*, 3 Dow, Parl. Cas. 23, per Lord Eldon, Chancellor; *Barnewall v. Church*, 1 Caines, N. Y. 217; *Field v. Ins. Co. of N. A.* 3 Md. 244; and see *infra*, No. 2152.

<sup>3</sup> *Talcot v. Commercial Ins. Co.* 2 Johns. N. Y. 124 and 467. See also

*Munro v. Vandam*, Park, 333, n. 3d ed. 469, 8th ed.; *Watson v. Clark*, 1 Dow, Parl. Cas. 344; *Cort v. Delaware Ins. Co.* 2 Wash. C. C. 375. The question as to the inference to be made from the vessel's proving leaky soon after sailing, without apparent cause from sea-perils, is presented in *Mills v. Roebuck*, Marshall, Ins. 154; Park, Ins. 460, 8th ed.; but the case gives no light on the subject of seaworthiness; and see *infra*, No. 2079.

<sup>4</sup> *Lee v. Beach*, Park, Ins. 342; Marshall, Ins. 160; *Myers v. Girard Ins. Co.* 26 Penn. St. 192.

<sup>5</sup> *Douglas v. Scougal*, 4 Dow, Parl. Cas. 269.

<sup>6</sup> No. 696.

inal port of departure. Such compliance is generally a condition precedent to the attaching of the risk; there are, however, exceptions, and these I proceed to state.

*This warranty is not violated so as to defeat the insurance by a merely incidental, temporary deficiency at the commencement of the risk, in fitness for the voyage, that may be easily remedied, and soon is so, in fact:*<sup>1</sup>

As in the Massachusetts case, already mentioned, of the needle of the compass being attracted by some iron-work:<sup>2</sup>

So in case of the vessel being temporarily unseaworthy for want of sufficient ballast;<sup>3</sup>

Or the cargo so stowed as to cause the vessel to be out of trim.<sup>4</sup>

So Mr. Justice Story intimates that the risk attaches and continues under the policy, notwithstanding that the sailors are in a state of intoxication at the time of sailing, though the underwriters would not be liable for a loss occasioned thereby.<sup>5</sup>

So in a South Carolina case of a vessel not having a pilot, and yet getting safe over the pilot ground, the policy was held not to be forfeited.<sup>6</sup>

In an English case of a vessel unseaworthy by being overloaded, which put back and discharged a part of her cargo with the consent of the underwriters, they were held to be liable for a subsequent loss. The decision does not appear to be put merely upon the consent of the insurers, for Lord Tenterden remarks: "It is said that the memorandum expressing the consent of the underwriters is void, and that, in order to bind the underwriters, a new contract was necessary, inasmuch as the fact of the vessel having sailed in an unseaworthy state, put an end to their liability under the policy. That proposition would go the length of establishing, that if a vessel, at the outset of her voyage, be by mistake or accident unseaworthy, owing to

<sup>1</sup> Taylor v. Lowell, 3 Mass. 331;      <sup>4</sup> Chase v. Eagle Ins. Co. 5 Pick. Merchants' Ins. Co. v. Clapp, 11 Pick. Mass. 51.  
Mass. 56.

<sup>2</sup> Stanwood v. Rich, Sup. Ct. Mass. C. 121.  
Suffolk, November, 1817.

<sup>3</sup> Deblois v. Ocean Ins. Co. 16 Pick.      <sup>6</sup> M'Millan v. Union Ins. Co. Rice, So. C. 249.  
Mass. 303.



some defect which is immediately discovered and remedied, before any loss happens in consequence of it, still that the policy would be void, and the underwriters not liable. I was surprised at that proposition, because, if true in point of law, I fear we should find many cases where the assured could have no claim upon the underwriters, because something was wanting, or something excessive, at the instant of the ship's departure, although the want had been supplied, or the excess removed, before the loss happened."<sup>1</sup>

727. *If the risk is intended and understood by the parties to commence at some intermediate stage of a voyage at sea, or at some distant port beyond the superintendence and control of the assured, the requisites to a compliance with this warranty may be, and usually are in fact, not the same as at the original port of departure when the risk begins there. In such case this stipulation for seaworthiness is satisfied if the vessel was in a condition to pursue her adventure, though large repairs were requisite, and though it may have been necessary to go to some port for the express purpose of making the repairs.*<sup>2</sup>

Where a vessel insured, lost or not lost, with liberty of a letter of marque, was absent on a fishing voyage, the risk to commence about a year before the date of the policy, at which time she had been weak-handed, and was soon after seized by some Spanish prisoners on board of her, who rose upon the crew, Lord Kenyon ruled, that, if she had sufficient force to pursue any part of her adventure, or to navigate her home, the warranty was satisfied.<sup>3</sup>

This question is elaborately considered by the English Courts of Queen's Bench and Exchequer Chamber, and in the House of Lords, in a case of a policy for one year, upon the plea that the vessel was not seaworthy either at the date of the policy or at the time when the risk was to have begun. Parke, B., giving

<sup>1</sup> Weir v. Aberdeen, 2 Barnew. & Ald. 320. Mr. Justice Story intimates a doubt of this case, M'Lanahan v. Universal Ins. Co. 1 Pet. 170.

<sup>2</sup> Dixon v. Sadler, 5 Mees. & W. Exch. 414; Sadler v. Dixon, 8 Mees. & W. Exch. 895; Am. Ins. Co. v. Og-

den, 20 Wend. N. Y. 287; Copeland v. N. E. Marine Ins. Co. 2 Metc. Mass. 432; Hollingworth v. Brodrick, 7 Ad. & E. 40.

<sup>3</sup> Hucks v. Thornton, 1 Holt, 30. See also Paddock v. Franklin Ins. Co. 11 Pick. Mass. 227.

the opinion of the Court of Exchequer Chamber, said: "It is undoubted law, that there is an implied warranty that the ship had been seaworthy when the voyage had commenced, if the insurance is on a vessel already at sea."<sup>1</sup>

The Baron then proceeds to state that there is no warranty of the seaworthiness of the vessel at the commencement of the risk, wherever the vessel may be, where the risk begins at sea, since it is well understood that the assured could not know what was the condition of the ship. The plea in the case referred to was accordingly held to be bad.

The difference is stated, by some of the judges, to be between a voyage-policy, under which the risk is to begin with the voyage, and a time-policy. This phraseology is deceptive. The difference intended evidently is, that between a policy under which the risk is to commence at the home port, or at some other, where there are ample means for repairs and refitting and where it is subject to the superintendence of the owner or his agents, and one that is to commence at a distance, at sea or at some intermediate stage of a voyage.

It has accordingly been held that there is no implied warranty of seaworthiness in a policy to commence on the "meridian of the day of sailing from S."<sup>2</sup>

It has also been ruled that there is no such warranty in a time-policy, and a plea that at the time for the policy to attach the ship was unseaworthy was held bad; though the case went off upon other grounds.<sup>3</sup>

The same doctrine is reasserted by the Court of Queen's Bench.<sup>4</sup>

It is immaterial whether the policy is for a certain period, or from one geographical point to another, or from a certain date, as it often is, to the end of the pending voyage, or to any subsequent port. If, for instance, the vessel on a fishing or trading voyage is insured at and from a certain intermediate port where

<sup>1</sup> *Small v. Gibson*, 16 Ad. & E. 128, 141; 3 Eng. L. & Eq. 290, 299; *Gibson v. Small*, 4 Hou. L. Cas. 353; 24 Eng. L. & Eq. 16.

<sup>2</sup> *Michael v. Tredwin*, 17 C. B. 551; 33 Eng. L. & Eq. 325.

<sup>3</sup> *Thompson v. Hopper*, 6 Ell. & B. 172; 34 Eng. L. & Eq. 266.

<sup>4</sup> *Fawcus v. Sarsfield*, 6 Ell. & B. 192; 34 Eng. L. & Eq. 277. *Earle, J.*, dissenting as he did also in *Thompson v. Hopper*.

it is well known that it could not be repaired and refitted to any great extent, it would be substantially equivalent to beginning the risk in the midst of a passage since some repairs can be made at sea. The discrimination relates to the means of superintendence and of repairing and refitting, under the circumstances in which the parties expect the risk to begin, of whatever description the policy may be in other respects, and however the duration of the risk may be described.

In *Gibson v. Small* in the House of Lords, elaborate opinions were given by Martin, B., Talfourd, J., Williams, J., Platt, B., Erle, J., Maule, J., Alderson, B., Parke, B., and Pollock, C. B., before the House; and by Lord St. Leonards and Lord Campbell of the House. Some of these judges maintained that there is no implied warranty of seaworthiness in such a policy. Others were in favor of an implied warranty of seaworthiness at the last port visited before the beginning of the risk. The judgment in the House of Lords was in affirmance of that of the Exchequer Chamber, that there was no implied condition that the ship was seaworthy at the time of making the policy or at the beginning of the risk, reversing the judgment of the Queen's Bench.

The discussions in this case, by reason of its coming up on the plea that the vessel was not seaworthy, turned very much upon the question, whether there was a condition precedent that the vessel should be seaworthy in the strict signification of the term. The question which we are considering is, however, a wider one, namely, whether there is any, and, if any, what implied stipulation of the assured as to the fitness and sufficiency of the vessel in such a case. The word "seaworthiness" not being ordinarily used in the policy, it does not contain any particular phraseology upon the construction of which the question arises; the case is open to the inference of any stipulation as to the state of the vessel at the time for the risk to begin, merely from the fact of effecting the insurance, free from any embarrassment by reason of the express terms of the contract.

This question respecting an implied condition in a time-policy, that the vessel is seaworthy, came before a committee of the Privy Council in England on appeal from a decision in

Bengal, under a policy upon a steam-vessel for four months, which had been wrecked on a passage on which she started after the risk had begun, with an insufficient crew. The committee consisted of Jervis, C. J., Dr. Lushington, Pemberton Leigh, Sir Edward Ryan, and Sir John Patteson, who adjudged the underwriters to be liable for the loss, partly on the authority of the case last cited; Mr. C. J. Jervis remarking, that if there was in a time-policy a condition that the vessel should be seaworthy on leaving each port successively, there would be less warranty of seaworthiness in a voyage-policy than in a time-policy,<sup>1</sup> which he thought could not be. This consequence does not, however, seem to be necessary, for a court would hesitate to decide in favor of a recovery for a loss occasioned by the neglect of the assured to procure a sufficient crew, whether the policy were for a voyage or for a specific time.

The same question has since come up in Massachusetts on a policy for one year at all times and places, upon a vessel being at the time at sea, which arrived at Boston, her home port, and then made a passage to Norfolk, and there took a cargo for Sicily. Being found, after sailing, unfit to proceed, on account of the defects of her timbers, she put back to Savannah, where it was ascertained that she required expensive repairs, to procure which she sailed, with a light cargo, for New York, where the repairs would cost less, and on the passage was burnt. It appeared, at Savannah, that she would within the year require great repairs. One question was, whether the policy was defeated by unseaworthiness. Shaw, C. J., stated the opinion of the court, that there is in such a case not the usual warranty of seaworthiness, but only the implied condition, "that the vessel is in existence as such at the commencement of the risk, capable of navigation, and safe, whether at sea or in port, and seaworthy when she first sails, or, if at sea, had sailed seaworthy, and is safe."<sup>2</sup> Or rather, perhaps, that she had not sustained actual damage.

<sup>1</sup> Jenkins v. Heycock, 8 Moore, P. C. 351.

<sup>2</sup> Capen v. Washington Ins. Co. 12 Cush. Mass. 517. See also Jones v. The Ins. Co. 2 Wall. Jun. C. C. 278;

Hoxie v. Pacific Ins. Co. 7 All. Mass. 211; in which it is held that there is a warranty; Macy v. Mutual Ins. Co. 12 Gray, Mass. 497; in which it was held there is no warranty. See also Rouse



The jurisprudence, both English and American, seems, at least, to converge to the doctrine that the risk may begin at sea or a distant port, though the requisite repairs cannot be there made.

728. *Under a policy by which the risk commences at some intermediate stage, the assured impliedly warrants against loss or damage in direct consequence of previous negligence or mismanagement by the master and crew, or any person having charge of the ship.*

Under a policy which does not include barratry, the acts of the master and crew in navigating the vessel, not amounting to barratry, are unquestionably, to a great extent at least, at the risk of the insurers, as we shall see under the head of Risks; but they cannot be presumed to insure against the direct effects of the previous fault of the master and crew, existing at the commencement of the risk. It is so stated by Parke, B., who, speaking of insurance on an absent ship, to commence at some intermediate stage of the voyage, says: "If the ship had met with damage before, and could have been repaired by the exercise of reasonable care and pains, and was not, the policy would not attach."<sup>1</sup>

That is to say, the defective state of the ship under such circumstances would affect the policy in the same manner as where the risk under the policy commences with the voyage. This coincides with the remarks of Mr. C. J. Shaw;<sup>2</sup> and the prior negligence of the assured or his agents, including among these the master and crew, and all the direct consequences of it, are at the risk of the assured, and are not to be drawn into a policy so made. \*

729. *Whether a policy is for a voyage or period of time, the construction of this warranty is the same as to compliance being a condition precedent at the outset, and as to non-compliance at intermediate stages of the risk.*<sup>3</sup>

*v. The Ins. Co.* 25 Bost. Law Rep. 523, where Grier, J. doubts whether the English decisions are applicable in the United States. Also *Hoxie v. Home Ins. Co.* 32 Conn. 21; in these two cases the vessels left the home port, and the warranty was therefore implied.

<sup>1</sup> *Small v. Gibson*, 3 Eng. L. & Eq. 290, 299.

<sup>2</sup> *Paddock v. Franklin Ins. Co.* 11 Pick. Mass. 227.

<sup>3</sup> *Small v. Gibson*, 3 Eng. L. & Eq. 290, 299; *Dixon v. Sadler*, 5 Mees. & W. Exch. 414; S. C. 8 id. 895; *Hollingworth v. Brodrick*, 7 Ad. & E. 40; *American Ins. Co. v. Ogden*, 20 Wend. N. Y. 287; per Walworth, C. p. 296; and see cases cited supra, No. 727.

730. *After the policy has once attached, a compliance with this warranty ceases to be a condition precedent to the liability of the insurers for any loss ; for though a subsequent non-compliance may be of such a character as to discharge the insurers from liability for any loss happening thereafter, they undoubtedly still remain liable for any loss prior to such non-compliance.*

In this case, as in that of representation, a loss may, by the terms of the policy, have become payable before the forfeiture by non-compliance takes place.

731. *The obligation still rests upon the assured to keep the vessel seaworthy if it be practicable, so far as it depends on himself.*<sup>1</sup>

A shipment being made at half profits instead of freight, from Newburyport to Calcutta and back, the goods shipped at Calcutta in exchange were damaged in that port by the leakage of the ship. It was held that the ship-owner was answerable for this damage ; or, in other words, that he was bound to put his ship in repair at that port, even though the leak should have arisen from damage sustained on the outward voyage, and have been caused by perils of the seas which were excepted in the bill of lading.<sup>2</sup>

In a subsequent case before the same court, it was held to be the duty of the owner to procure the necessary and reasonable repairs in the successive stages of the voyage, according to the means that can be had for the purpose ; and if they are neglected, this implied stipulation is not complied with. But, as Mr. Chief Justice Shaw remarks, where the voyage extends abroad to great distances, and continues for a long time, this stipulation is to be liberally construed.<sup>3</sup>

So a distinction is made by Lord Mansfield, between this

<sup>1</sup> 3 Kent, Com. 288, 3d. ed. ; De-  
peyre v. Western Fire & Mar. Ins. Co.  
<sup>2</sup> Rob. La. 457 ; and see cases gener-  
ally.

<sup>2</sup> Putnam v. Wood, 3 Mass. 481.

<sup>3</sup> Paddock v. Franklin Ins. Co. 11  
Pick. Mass. 227 ; and see Holdsworth v.  
Wise, 7 Barnw. & C. 794 ; Copeland  
v. New England Mar. Ins. Co. 2 Mete.

Mass. 432 ; Hollingworth v. Brodrick, 7  
Ad. & E. 40 ; Starbuck v. New England  
Mar. Ins. Co. 19 Pick. Mass. 198 ;  
Hazard v. New England Mar. Ins. Co.  
1 Sumn. C. C. 218. In the case of  
Mills v. Roebuck, Park, 7th Lond. ed.  
335, and Marshall, 3d Lond. ed. 124,  
the same subject is presented, but noth-  
ing is decided.

warranty as applied to the commencement of the risk, or the departure of the ship, and the subsequent stages.<sup>1</sup>

In some of the above cases, the neglect of the master to make repairs at intermediate ports is imputed to the assured. Whether it should be so imputed is subsequently considered.<sup>2</sup> So far as the assured and the agents by him authorized, other than the navigators of the vessel, are concerned, the cases agree that he is bound to reasonable care and diligence in providing for and maintaining the seaworthiness of the vessel.

732. As the assured is answerable for the representations of his agent in effecting the insurance, and fitting out the vessel originally, so *the acts and neglects of those whom the ship-owner appoints to represent him in the intermediate stages of the voyage or risk, for other purposes than the mere charge and navigation of the vessel, are imputable to him, so far as seaworthiness is thereby affected.*

The extent of this responsibility will depend upon the nature, duration, and exigencies of the voyage, and the usages of the trade. Whether the master or any correspondent is authorized by the assured on the ship to act for him in matters to be transacted at foreign ports, other than the charge and management of the vessel, — such, for instance, as supplying funds adequate to the probable necessities of the voyage or service, whatever it may be, — the acts or neglects of such agent for such purposes are imputable to the assured, on either ship, freight, or cargo, so far as the risks insured against are concerned.<sup>3</sup> This, at least, is usually implied in the phraseology of judges and jurists, and often, as we shall see, a much greater responsibility is directly asserted; namely, responsibility for the acts and neglects of the master as such.

The question whether underwriters are in general so liable, will recur under the head of Risks, and is noticed here merely in reference to the warranty of seaworthiness. If, in an emergency, not to be anticipated and provided for by the ship-owner, the aid of some person is justifiably invoked by the master; or if a consul or some other person in a foreign port interferes, this is a different

<sup>1</sup> *March v. Pigot*, 5 Burr. 2802. See also *Caldwell v. Western Ins. Co.* 19 La. 42, for a like distinction.

<sup>2</sup> No. 732, 733, 734.

<sup>3</sup> Per Walworth, Ch., *American Ins. Co. v. Ogden*, 20 Wend. N. Y. 301.

case. We are now considering merely the case where, by the usages of the trade, or ordinary demands of the voyage, a representation of the ship-owner is requisite in a foreign port for other purposes than those falling within the proper authority and duty of the master as such, and the proposition is, that the assured is bound, as far as the question of seaworthiness is concerned, according to the usages or usual necessities of the voyage, to provide for such a representation, by the master or an agent, and is responsible for the acts and neglects of the agent so appointed by him.

733. *Whether, under a policy on the outward and return voyage, in case of the vessel having been seaworthy at the beginning of the voyage at the home port of departure, its subsequent unseaworthiness, occasioned by the mistake or negligence of the master on a passage, or in a foreign port, is a non-compliance with the warranty of seaworthiness, so as to discharge the underwriters?*

It was held by the English Courts of Exchequer and Exchequer Chamber, after deliberate consideration, where the master rendered the vessel unseaworthy by throwing over ballast, that the underwriters were not thereby discharged, but remained liable as before for damage by perils of the seas.<sup>1</sup>

A decision similar in principle has been made by the English Court of King's Bench in case of a vessel insured from Ireland to Newfoundland and back, that sailed on her homeward voyage in an unseaworthy condition.<sup>2</sup> The vessel leaked on sailing from St. Andrews, on her homeward passage, making ten inches of water in her hold per hour. It is not said whether repairs could have been made at St. Andrews, or whether there was any fault in her sailing as she did. A question was made, whether it was a fault in the master and crew to abandon the vessel at sea, which was not decided in this case. Bayley, J., referred on this point to another case pending in the same court,<sup>3</sup> in which it was held by Lord Tenterden and his associates, that the underwriters were liable for a loss by perils insured against, though

<sup>1</sup> Dixon v. Sadler, 5 Mees. & W. Exch. 415; Sadler v. Dixon, 8 id. 895.

And it was so held where the master overloaded the vessel; Merchants' Ins. Co. v. Butler, 20 Md. 41.

<sup>2</sup> Holdsworth v. Wise, 7 Barnew. & C. 794.

<sup>3</sup> Shore v. Bentall, 7 Barnew. & C. 798, n.



occasioned by the "misconduct or negligence of the captain and crew."

This doctrine is in accordance to the more general one, that will be stated under the title of Risks; namely, that, if the vessel was seaworthy at the beginning of the voyage, the insurers are not exonerated from loss by any risk insured against, though occasioned by the misconduct or negligence of the master and crew, short of barratry, in the navigation and management of the vessel.<sup>1</sup>

A contrary decision by Lord Kenyon, and Grose, and Lawrence, Justices, before referred to,<sup>2</sup> is conclusively overruled by the preceding cases.

If the misconduct amounts to barratry, the insurers are not responsible for loss thereby occasioned, unless that is one of the risks insured against.

The doctrine now well established in England extends the liability of the insurers to the case of a loss consequent upon, as well during as subsequent to, the unseaworthiness occasioned by the neglect or mistake of the master or mariners. There is not apparently any difference in principle in the two cases.

The same doctrine is supported by an American case, where a loss was occasioned by the mate's not taking charge of the vessel, instead of leaving it in command of the master, who was evidently subject to mental derangement before sailing from a foreign port;<sup>3</sup> for this was the mistake or negligence, or both, of the mate. It is true, the court say that the vessel was seaworthy, because the mate was capable of navigating it. But surely, if the assured had given command to an insane captain at the commencement of the voyage, the vessel would not have been seaworthy, though some officer had been on board capable of navigating it, without authority to do so. The skill of the officer is in such a case unavailable. So it was in this case, through the neglect or mistake of the mate. The case, therefore, does

<sup>1</sup> *Busk v. Royal Exch. Ass. Co.* 2 Barnew. & Ald. 73; *Walker v. Maitland*, 5 Barnew. & Ald. 171; *Bishop v. Pentland*, 7 Barnew. & C. 219; and *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507, and *Waters v. Merchants' (Louis-* ville) *Ins. Co.* 11 id. 213, are to the same effect.

<sup>2</sup> *Law v. Hollingsworth*, 7 Term, 160; *supra*, No. 712.

<sup>3</sup> *Copeland v. New England Mar. Ins. Co.* 2 Metc. Mass. 432.

not seem to be distinguishable in principle from one of unseaworthiness by omission to make repairs at a foreign port, through the negligence or mistake of the master. Negligence or mistake of an officer or mariner is upon the same footing in this respect as that of the master.

Mr. Justice Story, giving the opinion of the Supreme Court of the United States, remarks that the above doctrine of the English courts "is well worthy of discussion."<sup>1</sup>

Mr. C. J. Shaw, giving the opinion of the Supreme Court of Massachusetts, remarks upon the same doctrine, as stated in the case of *Sadler v. Dixon*:<sup>2</sup> "If this is to be taken as limited to the case where the master, officers, and crew act in their own proper sphere, as practically managing and conducting the navigation, and where the master does not stand in the relation of representative and agent of the owners, we think it is not inconsistent with the general principle, leaving the owner still bound by the acts of the master, so far as by the law and usage of navigation, he is the representative of the owners, executing their express or implied orders, and doing all such acts as the owner himself might and would do if present."<sup>3</sup>

It does not appear that the English courts extended the doctrine beyond the limit of the duty of the master as such. It is not obvious what duties the usages of a voyage can put upon the master affecting seaworthiness, other than those belonging to him in that capacity. The acts of the master in taking measures for maintaining the navigability and seaworthiness of the vessel do not appear to be distinguishable, in reference to the present inquiry, from his acts in navigating it.

The earlier cases supply dicta, and decisions, opposite in doctrine, and even some comparatively recent ones.<sup>4</sup>

I conclude, however, that the better doctrine is, that,

*Where the vessel is seaworthy in the outset, loss by perils insured against consequent upon subsequent unseaworthiness occasioned by*

<sup>1</sup> *McLanahan v. Universal Ins. Co.* 1 Pet. 180.

<sup>2</sup> 8 Mees. & W. Exch. 895.

<sup>3</sup> *Copeland v. New England Mar. Ins. Co.* 2 Metc. Mass. 443.

<sup>4</sup> See *Grim v. Phoenix Ins. Co.* 13

*Johns. N. Y.* 451; assumed in *Coolidge v. New York Fire Ins. Co.* 14 *Johns. N. Y.* 308; and in *American Ins. Co. v. Bryan*, 26 *Wend. N. Y.* 563, in the Court of Errors.

*the negligence or mistakes of the master and crew, without fraud, is at the risk of the underwriters.*

734. *In case of a temporary unseaworthiness imputable to the assured, whereby the perils insured against are generally affected, the risk is suspended, and revives on the navigability of the vessel being restored, and the subject being liable to the same risks as if the warranty had been complied with.*

As we have seen, a vessel may be in a condition to answer this warranty in port, so that the policy attaches there, on whichever interest it is made, but the warranty may be violated on its sailing in the same condition.

Here, the policy having attached, the premium is secured to the underwriter for the whole voyage or passage, or year, and the question occurs, whether the assured is to lose it entirely, or may, by remedying the defect, revive the policy. Much of the jurisprudence on this subject, the earlier part of it especially, proceeds on the assumption that the insurance is gone irretrievably. The first decision to the contrary that I am aware of was in the Massachusetts case of 1807, already mentioned,<sup>1</sup> on a premium note for a ship, cargo, and freight, at and from Calcutta, which was held to attach in that port. The warranty was held to be violated, and the risk to be suspended, on the sailing of the vessel in an innavigable state, but the risk was held to revive on the return to the same port for repairs, and to continue during the voyage to the United States.

The most important feature in this case is the doctrine as to the suspension and revival of the risk. The doctrine is in strict analogy to the rule in case of temporary withdrawal of the cargo from the risks insured against, and supported by considerations of equity and commercial expediency, and a predominant principle in jurisprudence, that unnecessary forfeitures are to be avoided.

735. *If loss consequent upon an unseaworthiness for which the assured is answerable is clearly distinguishable from loss otherwise arising from the perils insured against, the risk may continue in respect to other losses, notwithstanding the unseaworthiness.*<sup>2</sup>

“It would,” says Mr. Chief Justice Shaw, “seem to be more

<sup>1</sup> Taylor v. Lowell, 3 Mass. 331.

Peters v. Phoenix Ins. Co. 3 Serg. & R.

<sup>2</sup> Taylor v. Lowell, 3 Mass. 331; Penn. 25.

consistent with the nature of the contract, the intent of the parties, and the purposes of justice and policy, to hold, that, after the policy has once attached, the implied warranty should be so construed as to exempt the underwriters from all loss or damage which did or might proceed from any cause thus warranted against; but to hold him still responsible for those losses which by no possibility could be occasioned by a peril increased or affected by the breach of the implied warranty.”<sup>1</sup>

The case of continued liability for loss by perils of seas, though the implied warranty of documents of neutral ownership is not complied with, is to the same effect;<sup>2</sup> and to hold the contract to be totally forfeited in such a case is superfluously to inflict a penalty by a forced construction of an implied stipulation, in contradiction to the spirit and principles of the commercial law at least, not to say all kinds of law.

The same doctrine is adopted by the Superior Court of the City of New York, and by the Supreme Court of the State of New York, and the Court of Errors of the same State, in case of a vessel insured on time, and subsequently to the commencement of the risk becoming unseaworthy in consequence of not having a small bower-anchor, on a passage from Charleston to St. Thomas. Mr. Chief Justice Savage, giving the opinion of the Supreme Court, says: “The fact that the vessel was not supplied with anchors when she left Norfolk cannot excuse the insurers, as the loss was sustained from an injury received from the winds and waves while the vessel was at sea, where it was totally immaterial, as to the injury, whether she had one or two anchors, or none at all.”<sup>3</sup>

The same doctrine is elaborately maintained in the Court of Errors, by Chancellor Walworth, and Senators Verplanck and Wager, and is not controverted by the other members of that court,<sup>4</sup> and has become intimately incorporated with American jurisprudence. Though it is not specifically laid down in Eng-

<sup>1</sup> *Paddock v. Franklin Ins. Co.* 11 Pick. Mass. 227. The same doctrine is distinctly reiterated in a subsequent case before the same court. *Capen v. Washington Ins. Co.* 12 Cush. Mass. 517.

308; and see *Starbuck v. New England Mar. Ins. Co.* 19 Pick. Mass. 198.

<sup>3</sup> *American Ins. Co. v. Ogden*, 15 Wend. N. Y. 532.

<sup>4</sup> *American Ins. Co. v. Ogden*, 20 Wend. N. Y. 287.

<sup>2</sup> *Cleveland v. Union Ins. Co.* 8 Mass.



lish jurisprudence, there is some ground for inferring it from the doctrine that has been stated in divers cases, that the warranty of seaworthiness as a condition precedent has reference only to the commencement of the voyage ;<sup>1</sup> whence it may be concluded, that, in intermediate stages, it is only an implied stipulation to exempt underwriters from loss by unseaworthiness, where this is distinguishable.

### SECTION III. LEGAL CONDUCT.

736. *It is an implied stipulation of the policy, that the vessel shall be navigated, and the adventure conducted, according to the laws of the country to which the vessel belongs, the treaties subsisting between that and other countries, and the law of nations.*<sup>2</sup>

We have seen that the trade must be legal ; this warranty has reference to the manner of carrying it on, and the doctrine stated is, that, although the adventure itself be legal, yet if the assured violate the law in prosecuting it, the policy is thereby defeated, as far as the illegality affects the risks insured against, and is imputable to the assured.<sup>3</sup>

737. *Though a temporary, or incidental and merely collateral illegality, may not contaminate the entire contract on the part of the assured, yet, if it is done by himself, or with his authorization or assent, the insurers are doubtless exonerated from the consequent loss and damage though caused immediately by the perils insured against.*<sup>4</sup>

738. *This implied stipulation does not prevent insurance against the illegal acts of others, as barratry, piracy, &c.*

739. *If the policy excepts barratry, then this implied stipulation exonerates the insurers from loss and damage caused immediately by the perils insured against, in direct consequence of barratrous acts.*

740. *But if the illegal acts by the master or crew, in managing and navigating the vessel, are not of a barratrous character, nor directly or indirectly authorized by the assured, and are merely*

<sup>1</sup> Holdsworth v. Wise, 7 Barnw. & C. 794 ; Redman v. Wilson, 14 Mees. & W. Exch. 476.

<sup>2</sup> Marshall, 177, book 1, c. 5, s. 4.

<sup>3</sup> See supra, c. 3, s. 2, No. 210, 214, 218, 220, 221, 223.

<sup>4</sup> See as above.

*negligences or mistakes, this warranty does not, as I understand the law, exonerate the insurers from the consequent loss by a peril insured against.*

The preceding propositions are involved in the judicial jurisprudence heretofore referred to, though the one last stated was formerly, and has sometimes been more recently, as we have seen, disclaimed, and the opposite doctrine asserted.

741. *This implied warranty of legal conduct is not applicable to damage and loss directly consequent upon any illegality, without the intervention of any peril expressly insured against, since such loss does not at all come within the terms of the policy, and is wholly at the risk of the assured, of whatever character or degree it may be.*

#### SECTION IV. BELLIGERENT RISKS.

742. The national character of the ship or goods is frequently the subject of an express warranty. *It is, however, implied by the mere fact of making the insurance, without any express provision of the policy, that the insurers are not to be answerable for any loss consequent upon neglect of the assured himself in preserving and manifesting the national character of neutral property which is insured by the policy, though it is not described as neutral in the policy.*

Mr. Justice Sewall says: "The neutral character of the property is understood by the parties, and necessarily inferred, where the insurance is made by a citizen of a neutral State, resident there, of his own property; and without any express representation or warranty, the assured impliedly engages to preserve his property, and to conduct the voyage insured, in a neutral condition and character, to which alone the insurance applies." <sup>1</sup>

743. Under this implied warranty of documents and insignia of the real national character of neutral property, *the underwriters are undoubtedly exonerated from loss by defect of such evidences accompanying the subject, so far as it depends upon himself and his agents for shipping the property and furnishing the proper bills of lading, invoices, certificates, &c.*

<sup>1</sup> *Stocker v. Merrimack Ins. Co.* 6 Mass. 220.

The question, how far any mistakes or negligences of the master or mariners in maintaining a neutral character and observing neutral conduct are imputable to the assured under this implied warranty, or may be visited upon the insurers, has not been discussed in the judicial tribunals. Analogy is a ground of inference that *a defect in maintaining the national character of the insured subject itself, whether ship or goods, is imputable to the assured, however it may have arisen.*

But if the neutral character of the ship is indirectly affected by that of the goods, or vice versa, it seems hardly to come within this implied warranty, and *would not exonerate the insurer*, except on the ground of concealment or misrepresentation. This distinction is suggested merely, and not stated as a doctrine judicially established.

744. *The underwriters are not liable for loss consequent upon a neutral vessel's taking false papers :*

As in case of a Swedish vessel belonging to Gottenburg taking papers purporting that she was from Bergen, another neutral port.<sup>1</sup>

745. According to analogy and the weight of authority, *there is an implied stipulation on the part of the assured by the fact of effecting the policy, that the ship or goods insured are accompanied by documents and other insignia truly indicating their national character.*

Lord Kenyon and Mr. Justice Grose intimated an opinion in favor of such a stipulation ; Mr. Justice Lawrence thinking otherwise.<sup>2</sup>

Lord Ellenborough, in the earlier part of the period of his presiding in the King's Bench, and his associates, Grose, Lawrence, and Le Blanc, were against such an implied stipulation in the case of a policy on goods in an American vessel.<sup>3</sup>

Subsequently, the same court, Bayley being substituted for Lawrence, under a policy upon an American ship and cargo, were of opinion that there was such an implied stipulation, where there was no express warranty or any representation on the sub-

<sup>1</sup> Horneyer v. Lushington, 3 Campb. The point is suggested also in Price v. 85, and 15 East, 46. See also Stocker Bell, 1 East, 663.  
v. Merrimack Ins. Co. 6 Mass. 220.

<sup>3</sup> Dawson v. Atty, 7 East, 367.

<sup>2</sup> Christie v. Secretan, 8 Term, 192.

ject,<sup>1</sup> on what seems to be the true ground, that a loss from want of such documents and insignia was through the fault of the assured, which would limit the decision to those cases in which the assured can reasonably be presumed to have notice that the evidences of national character would be requisite.

In the English Common Pleas, Sir James Mansfield, C. J., and Heath, Lawrence, Chambre, and Gibbs, Justices,<sup>2</sup> fully concurred with the decision last above cited. The same court had previously given a similar opinion.<sup>3</sup>

746. In an earlier case than the preceding one, upon a policy on cargo, the Supreme Court of New York, Kent, being Chief Justice, intimated an opinion that documents of the national character of the ship were not necessary to its seaworthiness, and were only necessary when its national character was expressly warranted or represented.<sup>4</sup> In this case there was not any fault on the part of the assured himself, as it does not appear that he knew of the deficiency of the ship's documents. If the underwriters are held to be discharged from liability for the loss by capture and condemnation, on this ground, it is analogous to the case of a forfeiture of the insurance on the cargo by a shipper by fault of the ship-owner in not supplying a seaworthy vessel.

But such a construction in reference to a mere shipper is harsh. It is going far enough in reference to him to put the case upon the ground of representation and concealment. The doctrine will then be, that, *if the shipper knows of any material circumstance, not known or presumed to be so to the underwriter, in the ownership or documentary evidence or other insignia of the national character of the vessel, whereby it would be liable to detention or capture, he is bound to disclose it.* This is in principle the ground taken by the English King's Bench.<sup>5</sup>

747. *A neutral ship may carry belligerent goods without express leave in the policy.*<sup>6</sup> But the assured, if he knows of such goods being carried, or intended to be so, is bound to represent the fact.<sup>7</sup>

748. *Whether the policy implies that, if the assured is apprised or has reason to suppose, that the goods insured, or to be carried*

<sup>1</sup> Bell v. Carstairs, 14 East, 374.

<sup>2</sup> Le Cheminant v. Pearson, same plaintiff v. Alluett, 4 Taunt. 367.

<sup>3</sup> Steel v. Lacy, 3 Taunt. 285.

<sup>4</sup> Elting v. Scott, 2 Johns. N. Y. 157.

<sup>5</sup> Barker v. Blakes, 9 East, 283.

<sup>6</sup> Ibid.

<sup>7</sup> Vide supra, No. 743.



*in the vessel insured, or of which the freight is insured, are contraband of war, the underwriters are not to be liable for consequent detention or other loss, unless such fact is known to them, or presumed to be so?*

There are divers decisions that underwriters are liable for such loss without any actual or presumed notice of such risk.<sup>1</sup>

The circumstance of the goods being contraband is undoubtedly very material to the risk. It would therefore appear to be remarkable to find the principle established by different courts, that the fact of the goods being contraband should not affect the policy, though that fact were not represented or stated in the policy were it not recollected that during the wars between England and France, from 1790 to 1815, the courts of those countries, and more especially the vice-admiralty courts, established in the colonies, considered very many articles as belonging to the class of contraband. Most of the courts of the United States adopted the principle of the English courts, that foreign judgments are conclusive as to the facts adjudged. Unless, therefore, they had permitted the assured to insure, without any representation or specification in the policy, articles which the foreign courts condemned as contraband, insurance would have afforded but a very imperfect indemnity against the peril of capture. But both of these principles, as well that which makes a foreign judgment conclusive, otherwise than as between the parties to it, as that which permits the insurance of contraband goods without any specification of them in the policy, or any representation of their contraband character, seem to admit of very serious doubt.

The legal right of a neutral to carry goods contraband of war, unless forbidden by treaty or statute, is, as we have seen, recognized by good authority. Such right, and that of a belligerent to confiscate such goods, are sometimes said to be in conflict. But two principles of law cannot be inconsistent, though one is that of national law and the other that of the municipal law. One of them must predominate. If two propositions are contradictory, one of them, at least, is not law. The only way of

<sup>1</sup> *Juhel v. Rhineland*, 2 Johns. Cas. *v. Desdoity*, 2 id. 77; *Richardson v. N. Y.* 120; *Rhineland v. Juhel*, 2 id. *Maine Fire & Mar. Ins. Co.* 6 Mass. 487; *Seton v. Low*, 1 id. 1; *Skidmore* 102.

reconciling these rights is by saying, that the right of the neutral to carry contraband goods is qualified by its being subject to that of the belligerent to seize and confiscate them,<sup>1</sup> which is certainly not a very satisfactory basis of a right.

However this may be, we are safe in saying that, to the present purpose, the question is not one of legality, but of contract, express or implied. And considering it in this light, the general fundamental doctrines of representation and implied warranty plainly lead to the conclusion, that

*The assured is bound by an implied stipulation to disclose this risk by representation, upon the principles and subject to the qualifications and exceptions, applicable in reference to other material facts, according to the doctrine already stated under the head of Representation.*<sup>2</sup>

749. Chief Justice Marshall says: "It is not impossible that, without a warranty that the vessel is neutral property, *the attempt of a neutral vessel to enter a blockaded port* might be considered as discharging the underwriters."<sup>3</sup> It can hardly be doubted that it *would discharge the underwriters from all loss consequent thereon.*

750. *It is one of the implied conditions of the policy that the vessel shall have convoy for the voyage, where convoy is required by law, and where the sailing without it is not excused by the circumstances.*<sup>4</sup>

751. *A non-compliance with the implied stipulation for the evidences and insignia of the national character of the vessel does not discharge the underwriters from all subsequent liability. So far as any enhancement of the risk in this respect is imputable to the assured, he must bear the consequent loss; the insurers at the same time continuing to be liable in other respects.*<sup>5</sup>

<sup>1</sup> *Barker v. Blakes*, 9 East, 283; *Richardson v. Maine Fire & Mar. Ins. Co.* 6 Mass. 102.

<sup>2</sup> *Supra*, No. 624, 629.

<sup>3</sup> *Maryland Ins. Co. v. Woods*, 6 Cranch, 29.

<sup>4</sup> *D'Aguilar v. Tobin*, 1 Holt, 185.

<sup>5</sup> *Bell v. Carstairs*, 14 East, 374; *Cleveland v. Union Ins. Co.* 8 Mass. 308; *Polleys v. Ocean Ins. Co.* 14 Me. 141; and cases cited *supra*, No. 735.

## SECTION V. THE ABROGATION OF AN IMPLIED WARRANTY, CONDITION, OR STIPULATION.

752. The implied warranty of seaworthiness may be expressly superseded, as by the phrase "allowed to be seaworthy."<sup>1</sup>

So also the forfeiture by a violation of an implied condition may be cancelled by a written declaration.<sup>2</sup>

An implied condition "may be superseded by a verbal or written statement."<sup>3</sup>

753. *Survey of the ship by surveyors acting for the underwriters preliminary to the agreement to insure, in pursuance of an express standing regulation of the insurance company, is not a waiver on their part of their right to insist on the implied warranty of seaworthiness:*<sup>4</sup>

As under a rule of the Newfoundland insurance companies, specifying that "the survey should be the groundwork of the policy."<sup>5</sup>

<sup>1</sup> Phillips v. Nairne, 16 L. J. Com. Pl. 194.      plied warranty of seaworthiness. Mississippi Ins. Co. v. Stanton, 10 Miss.

<sup>2</sup> Weir v. Aberdeen, 2 Barnew. & Ald. 320.      340.

<sup>3</sup> Per Wilde, J., Parks v. General      <sup>4</sup> Myers v. Girard Ins. Co. 26 Penn.

Interest Ins. Co. 5 Pick. Mass. 34.      St. 192.

Whether advertising to take goods by      <sup>5</sup> Damson v. Cawley, Newfoundland

particular boats is a waiver of the im-      R. 433.

## CHAPTER IX.

### EXPRESS WARRANTIES, STIPULATIONS, AND CONDITIONS.

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| <p>SECT. 1. What constitutes an express warranty.</p> <p>2. Construction of, and compliance with an express warranty.</p> <p>3. Warranty of the time of sailing.</p> <p>4. Warranty of convoy.</p> <p>5. Warranty of neutral property, its form, import, and construction. Ownership.</p> <p>6. Origin of property warranted neutral.</p> <p>7. Documents, proofs, and insignia of neutral property.</p> | <p>SECT. 8. Warranty of neutral property requires neutral trade, employment, and conduct.</p> <p>9. Particular warranties and conditions.</p> <p>10. Warranties, conditions, and stipulations in fire policies.</p> <p>11. Warranties, conditions, and stipulations in life policies.</p> <p>12. Stipulation for set-off.</p> <p>13. Waiver of forfeiture by non-compliance with an express warranty.</p> |
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#### SECTION I. WHAT CONSTITUTES AN EXPRESS WARRANTY.

754. *An express warranty is an agreement expressed in the policy, whereby the assured stipulates that certain facts are, or shall be, true, or certain acts shall be done, relative to the risk.* It may relate to an existing or past fact, or be promissory and relate to the future.

755. *It is not requisite that the circumstance or act warranted should be material to the risk; in this respect an express warranty is distinguished from a representation.* Lord Eldon says: "It is a first principle in the law of insurance, that, if there is a warranty, it is a part of the contract that the matter is such as it is represented to be. The materiality or immateriality signifies nothing."<sup>1</sup> But where the assured warrants facts "as far as material" the materiality is important.<sup>2</sup>

756. *An express warranty or condition is always a part of the policy, but, like any other part of the express contract, may be*

<sup>1</sup> Newcastle Fire Ins. Co. v. Macmorran, 3 Dow, Parl. Cas. 255; Stout v. City Ins. Co. 12 Iowa, 371.

<sup>2</sup> Etna Ins. Co. v. Grube, 6 Minn.



*written in the margin,<sup>1</sup> or contained in proposals or documents expressly referred to in the policy, and so made part of it.<sup>2</sup>*

An insurance of goods described in the policy to be made "for account of M., of B.," was considered to be equivalent to a representation that he was owner, and that the insurance was for his benefit, and he being an American, and so known to the parties, the insurance was considered to be on American or neutral property.<sup>3</sup>

757. A warranty is often made by saying expressly in the policy that the assured "warrants" such a fact:

As, "Warranted the property of the assured, all Americans."<sup>4</sup>

But a *formal expression* of this sort *is not requisite to constitute a warranty*. Any direct or even incidental, allegation of a fact relating to the risk, has been held to constitute a warranty.

If insurance is made on "the Swedish brig S.," "the American ship M.," "the Spanish brig N. C.," &c., or on goods on board of vessels so described, it is a warranty that the vessel is Swedish, American, or Spanish.<sup>5</sup>

A vessel being insured, in time of peace, as "the British brig," &c., this is a warranty that she belongs to British owners; that her documents and equipments are those of a British vessel; and that she is navigated in the character of such a vessel.<sup>6</sup> But describing the vessel in the policy by an English name is not a warranty of its having an English national character.<sup>7</sup>

A statement in the policy that the vessel was in port on a certain day, was held to be a warranty of that fact.<sup>8</sup>

758. Doubts were entertained by the judges in Pennsylvania, whether insurance "on the good British brig called the John,"

<sup>1</sup> *Dennis v. Ludlow*, 2 Caines, N. Y. 111; *Bean v. Stupart*, 1 Dougl. 10; *Kenyon v. Berthon*, id. 12, n.

<sup>2</sup> *Routledge v. Burrell*, 1 H. Blackst. 254; *Worsley v. Wood*, 6 Term, 710.

<sup>3</sup> *Kemble v. Rhinelander*, 3 Johns. Cas. N. Y. 130.

<sup>4</sup> *Jenks v. Hallett*, 1 Caines, N. Y. 60.

<sup>5</sup> See *Lewis v. Thatcher*, 15 Mass. 431; *Higgins v. Livermore*, 14 id. 106; *Atherton v. Brown*, 14 id. 152; *Lo-*

*thian v. Henderson*, 3 Bos. & P. 499; *Barker v. Phoenix Ins. Co.* 8 Johns. N. Y. 307; *Goix v. Low*, 1 Johns. Cas. N. Y. 341; *Murray v. United Ins. Co.* 2 id. 168; *Vandenheuvel v. United Ins. Co.* 2 id. 127; *Wood v. Hartford Ins. Co.* 13 Conn. 533.

<sup>6</sup> *Francis v. Ocean Ins. Co.* 6 Cow. N. Y. 404.

<sup>7</sup> *Clapham v. Cologan*, 3 Campb. 382.

<sup>8</sup> *Kenyon v. Berthon*, 1 Dougl. 12, n.

was necessarily a warranty of the national character of the vessel. Whether these words would amount to a warranty, and what construction was to be put upon them, Judges Yeates and Brackenridge thought would depend, not only upon the words themselves, and the manner and connection in which they were introduced into the policy, but also upon the whole policy. Mr. Justice Yeates was of opinion, that this description was not a warranty of national character, because the risks insured against could not be affected by the fact that the vessel was British, since she was insured against sea-risks only; and the risk was to end on capture.<sup>1</sup> This distinction seems to be just; for, though the materiality of the fact stated in the policy is not requisite to constitute a warranty, yet *there seems to be no reason for considering the statement or recital of the fact to be a warranty, if it evidently cannot have any relation to the risk.* But a fact expressed in the policy will no doubt be presumed to have relation to the risk, unless it appears that it can have no such relation.

Thus, if it could have been supposed, in the preceding case, that the insurer might prefer to insure a British vessel against sea-risks, rather than one of any other national character, the description might be considered a warranty, a compliance with which would be a condition on which the liability of the underwriter would depend, though all other underwriters should be of opinion that the sea-risk would be less upon an American or French vessel. But if the national character of the vessel could not have any relation to the sea-risk, there seems to be no reason for considering it a warranty.

This distinction can apply, however, only to facts incidentally expressed, or introduced by way of recital, or, as in the above case, merely as description, and not purporting on the face of the policy to be stipulations. In such cases it seems to be quite reasonable to adopt the distinction made in the above case in the construction of marine policies, as it has been adopted in respect to those against fire.<sup>2</sup>

An analogous but broader doctrine prevails in respect to a bill of lading, "which" says Mr. Greenleaf, "may be contradicted

<sup>1</sup> Mackie v. Pleasants, 2 Binn. Penn.      <sup>2</sup> See section 10 of this chapter.

and explained in its recital, that the goods were in good order and well conditioned, and in any other fact which it erroneously recites.”<sup>1</sup>

759. *The insurance of goods to a certain port*, as to “port Sisal,” is not a warranty that the place has any port or harbor belonging to it. The meaning of the expression is to be determined by the fact, with which the underwriter is supposed to be acquainted.<sup>2</sup>

Where the *policy* was expressed to be “on the cargo, being 1031 hogsheads of wine,” the cargo consisted of the wine insured, and also eight cases of British manufactured goods. In behalf of the underwriters it was contended, that this should be considered a warranty that the whole cargo consisted of the wine insured. Lord Ellenborough said: “I think ‘the cargo’ does not mean the ‘whole cargo,’ but merely that the insurance shall attach upon that part of the cargo which consists of the 1031 hogsheads of wine. The risk was not increased by other goods being put on board.”<sup>3</sup>

760. As any statement of a fact in the policy is a warranty, though neither the word *warrant*, nor any formal expression of like import, is used; so there is frequently a warranty in form of expression, where there is none in fact. *The assured often “warrants” the property “free from average,” “detention,” or “capture,” or from other losses and perils, which is no more than an agreement that those shall not be among the perils and losses insured against*, and for which the underwriter is to be liable.

Although these forms of expression are sometimes spoken of as warranties, it would be absurd to consider them such in their character and construction, since, in the case of an insurance “free from average,” for instance, it would be adopting the doctrine that the occurrence of an average loss would render the policy void.

A stipulation in a policy upon a ship, that the insurers are

<sup>1</sup> 1 Greenleaf Ev., ed. of 1842, p. 354, s. 305. And he cites *Barrett v. Rogers*, 7 Mass. 297; *Benjamin v. Sinclair*, 1 Bail. So. C. 174; *Smith v. Brown*, 3 N. H. 580; *May v. Babcock*, 4 Ohio 334.

<sup>2</sup> *Delonguemare v. N. Y. Firemen's Ins. Co.* 10 Johns. N. Y. 120.

<sup>3</sup> *Muller v. Thompson*, 2 Campb. 610.

not to be "liable to any damage to or from her sheathing," was held, in Massachusetts, not to be a warranty that the ship was sheathed or should be kept so, but merely an exoneration of the insurers from all loss and damage to or on account of the sheathing.<sup>1</sup>

In a policy on a vessel for a year, a clause excluding all ports and places in Mexico, Texas, and the West Indies, from July 15th to October 15th, was held by Mr. Justice Story to be an exception of the risks in those ports, not a warranty against being at them during that time.<sup>2</sup>

A steamboat having been insured one month, and sustained damage during that time, was insured by the same underwriter against all risks, on condition that the damage sustained under the prior policy should be first repaired, during the first month, and before the completion of the repairs, it was sunk. Held, in Louisiana, that this was not a condition precedent to be complied with before the risk commenced on the second policy, but merely a stipulation that the repairs should be immediately made, and that the insurers were liable in the mean time on the latter policy.<sup>3</sup>

761. *A rule of a mutual insurance association merely directory to its committee in examining vessels, is not an express warranty:*

As the rule requiring "all ships to be inspected and approved by a committee of the club before admission: All ships hereby insured to be well found, and otherwise in a seaworthy state, as to the committee or their inspector shall from time to time seem meet: All chain cables to be properly tested." This was held not to be a warranty by the assured that the cable had been well tested.<sup>4</sup>

<sup>1</sup> *Martin v. Fishing Ins. Co.* 20 Pick. Mass. 389.

<sup>2</sup> *Palmer v. The Warren Ins. Co.* 1 Stor. C. C. 360.

<sup>3</sup> *Hyde v. Miss. Ins. Co.* 10 La. 525.

<sup>4</sup> *Harrison v. Douglas*, 5 Nev. & M. 180; 3 Ad. & E. 396.



## SECTION II. CONSTRUCTION OF, AND COMPLIANCE WITH, AN EXPRESS WARRANTY.

762. It is another distinction of an express warranty or condition from a representation, that *an express warranty must be "strictly," and it is even said "literally," complied with*: whereas it is sufficient that a representation is complied with substantially.

It is held, that the intention of the parties in a warranty, except as to the meaning of the words used, is not to be inquired into; the assured has chosen to rest his claims against the insurers on a condition inserted in the contract, and whether the fact or engagement, which is the subject of the warranty, be material to the risk or not, still he must bring himself strictly within that condition. The rigid construction put upon warranties, in this particular, has perhaps arisen, in part, from the maxim of the common law, that conditions are to be severely construed in regard to the party imposing them on himself.

"A warranty," says Lord Mansfield, "must be strictly performed, nothing tantamount will do."<sup>1</sup>

Mr. Justice Buller: "It is a matter of indifference whether the thing warranted be material or not, but it must be literally complied with."<sup>2</sup>

Mr. Justice Ashhurst: "The very meaning of a warranty is, to preclude all questions whether it has been *substantially* complied with; it must be literally."<sup>3</sup>

And Lord Eldon: "When a thing is warranted, it must be exactly what it is stated to be."<sup>4</sup>

But since the real meaning of a warranty is not always the literal meaning of each word and phrase, it is surely sufficient

<sup>1</sup> Pawson v. Watson, Cowp. 785. See as to constructions of, and compliance with, representations and warranties, supra, 70, 71, 72, 485 et seq., 527, 553, 569, 575, 603, 638, 640, 641, 652, 669, 670, 673, 674; and infra, 866-871, 872, 892.

<sup>2</sup> Blackhurst v. Cockell, 3 Term, 360. See also State Ins. Co. v. Arthur, 30 Penn. St. 315.

<sup>3</sup> De Hahn v. Hartley, 1 Term, 343; 2 Term, 186.

<sup>4</sup> Newcastle Fire Ins. Co. v. Macmorran, 3 Dow. Parl. Cas. 255.

in this contract, as in others, that an express provision has been complied with according to its real meaning, ascertained by the established rules.

I cannot, therefore, but doubt, on again examining a decision of the English King's Bench, in Lord Mansfield's time,<sup>1</sup> whether it is marked with the comprehensive justness generally characteristic of his opinions. It was upon a policy on a cargo from Africa to the West Indies, in the margin of which was the statement, "sailed from Liverpool with 14 six-pounders, &c., and 50 hands or upwards." The vessel had left that port with only 46 hands, quite as safe for the time as with 50, and taken on board the complement at Beaumaris, in the Isle of Anglesea, where she arrived in six hours from Liverpool. The apparently real meaning of the statement seems to have been, that she had gone on her outward passage with 50 hands; and this meaning was strictly complied with; and though it was not literally expressed, it was adequately signified, by such a memorandum.

763. *The acts of the master and those of other agents are imputable to the assured in reference to non-compliance with an express warranty.*<sup>2</sup>

764. *A non-compliance with a formal, direct, express warranty, though temporary, and though the risk from such non-compliance is wholly distinct from the other risks insured against, will, if it is simultaneous with the time for the commencement of the risk, wholly defeat the policy.*

Under a policy upon a ship and cargo from London to Guernsey, and thence to the coast of Africa, "warranted American property," the ship, on the passage to Guernsey, had not the passport provided for, as one of the documents of national character, in the treaty between the United States and France. She took it at Guernsey, and was subsequently captured by the French. Lord Kenyon and Justices Grose and Ashhurst held the underwriters not to be at all liable on the policy.<sup>3</sup>

<sup>1</sup> *De Hahn v. Hartly*, 1 Term, 343;      <sup>3</sup> *Rich v. Parker*, 7 Term, 705; 2  
unanimously confirmed in the Court of      Esp. 615. See also *Woolmer v. Muil-*  
*Exchequer*, 2 Term, 186.      man, 3 Burr. 1419; 1 W. Blackst. 427;

<sup>2</sup> *Duncan v. Sun Fire Ins. Co.* 6      *Fernandes v. Da Costa*, Park, 177;  
Wend. N. Y. 488; and see cases gener-      *Marshall, Ins.* 2d ed. 394.  
ally.

765. *Where an equitable and substantial fulfilment is the same as a strict and literal one, a representation and warranty are equivalent to each other; as was held in New York in respect to a representation or warranty of the neutral character of property.*<sup>1</sup>

766. Though a strict compliance with a warranty is required, yet *the construction of the language is determined, as in other cases, by usage and common acceptance.*

Where the warranty was that the vessel had "thirty seamen" on board, and to make up the number it was necessary to include the steward, cook, surgeon, some boys and apprentices, Lord Mansfield said: "The question was whether, in this warranty, the word *seamen* was used in the strict literal sense, or not. If it was, the warranty has not been complied with. It is a matter of construction. Boys are reckoned seamen, not only at the custom-house and Greenwich Hospital, but in the distribution of prizes. There is scarcely now such a thing as a ship entirely manned with seamen, strictly so called." And it was held that the warranty had been complied with.<sup>2</sup>

So the cook is included in the number of hands required on board a flat boat on the Mississippi.<sup>3</sup>

767. Mr. Justice Kent said: "A warranty must be literally complied with; but *this strict compliance ought to operate in favor of, as well as against, the assured, whenever he can bring himself within the terms of it.*"<sup>4</sup>

An instance of this occurred in the case of a warranty that "the ship should have twenty guns." She had in fact twenty-two guns, but only twenty-five men, a number quite short of the necessary complement for twenty guns. Lord Mansfield held this to be a compliance with the warranty. He said: "If a warranty be intended to mislead, it is a fraud." In this case there is no ground to impute fraud, and therefore the assured is entitled to recover."<sup>5</sup>

But we must presume that it was a substantial compliance,

<sup>1</sup> *Vandenheuvel v. Church*, 2 Johns. Cas. N. Y. 173, n.

<sup>4</sup> *Kemble v. Rhinelander*, 3 Johns. Cas. N. Y. 130.

<sup>2</sup> *Bean v. Stupart*, 1 Dougl. 10.

<sup>5</sup> *Hyde v. Bruce*, Marsh. 347; 3

<sup>3</sup> *Grant v. Lexington Ins. Co.* 5 Ind. Dougl. 213.  
23.

so that the risk was not enhanced in the particular case, otherwise such a construction would annul the warranty.

768. *The same strictness in construing the statements incidentally made in the policy is said not to prevail to the same extent on the continent of Europe.*

Emerigon says, if insurance be made on a vessel described in the policy to be "a ship," which is in fact a brig or sloop, the policy is void, provided the insurers did not know what sort of vessel it was, since they might have been led by the description to form too favorable an estimate of the risk; but if they were acquainted with the vessel, they will be bound by the contract. He says, if the vessel be superior or equivalent to what it is described to be, the conditions of the contract will be satisfied.<sup>1</sup>

Our law does not go to this extent, though there is nothing in principle to prevent a fact stated in the policy being put upon the same footing as one stated in a written representation, unless it is stated in the policy in a formal phrase of warranty or condition, importing that an exact compliance was deemed material by the parties. The precedents in our law, however, stop short of this, and, as already stated, only go to the doctrine, that, *where facts are stated merely by way of recital or description, and are not material to the risk, the clause is not a condition or warranty.*

769. *A compliance with a warranty, or any other agreement, is dispensed with, if it be rendered unlawful by a law enacted after the time of making the policy.*<sup>2</sup> But if it is unlawful at the time of making the policy, the contract is void.

770. *Where the fact warranted is falsified by the direct effect of a peril insured against, it is not a breach of the warranty:*

As where the warranty is of "lawful trade," barratry being insured against, and the loss is by barratrous unlawful trade by the master.<sup>3</sup>

Suppose a ship, insured against arrests and detention, to be warranted to sail on or before a certain day, and prevented from

<sup>1</sup> 1 Emerigon, c. 6, s. 3. See also 371; 1 Salk. 198. See also 1 Emerigon, n. 106.

<sup>2</sup> Brewster v. Kitchell, Ld. Raym.

<sup>3</sup> Havelock v. Hancill, 3 Term, 277.



sailing by an arrest and detention.<sup>1</sup> The embargo or other cause of detention may be removed before the assured has intelligence of it, which will take away his right of abandoning and claiming for a total loss. His insurance will therefore be defeated, unless a literal fulfilment of the warranty is dispensed with, in case of the non-compliance being occasioned by some of the perils insured against.

It will subsequently appear, that a deviation from the ordinary course of the voyage is justified, where it is occasioned by the operation of some of the perils assumed by the underwriters, or to which it is understood that the subject is to be exposed, which seems to be an analogous case.

771. A warranty has been defined to be a condition precedent, but this definition is applicable only to a warranty relating to the commencement of the risk. *If a warranty relates to a circumstance necessarily subsequent to the commencement of the risk, as that the ship shall take an armament at an intermediate port in the course of the voyage, the assured is entitled to recover for an antecedent loss, though the warranty should not be complied with.*

The premium is due in this case,<sup>2</sup> therefore a previous loss may be recovered, since it supposes a valid contract to have subsisted, at some time, between the parties.

Chief Justice Parsons intimates, that the right of recovering such previous loss might perhaps depend in some measure upon the circumstance of the policy being made before or after the loss actually takes place;<sup>3</sup> but it does not appear upon what principle such a distinction can be made.

Mr. Justice Sewall, in giving the decision of the court, laid down the principle that a loss, happening before a forfeiture of the implied warranty of seaworthiness, might be recovered notwithstanding such forfeiture, but he did not distinctly express an opinion in regard to the right of recovering, subsequently to a forfeiture of an express warranty, for an antecedent loss.<sup>4</sup>

In this case as in others analogous to it, a loss happening in

<sup>1</sup> See *Cruikshank v. Jansen*, 2 Taunt. 301.

<sup>2</sup> *Hendricks v. Commercial Ins. Co.*  
8 Johns. N. Y. 1.

<sup>3</sup> *Taylor v. Lowell*, 3 Mass. 337, 340.

<sup>4</sup> *Taylor v. Lowell*, 3 Mass. 331.

the earlier stages of the risk may, by the terms of the policy, be recoverable before the forfeiture of the warranty.

Mr. Arnould<sup>1</sup> adheres to the doctrine that a non-compliance with a warranty at any stage of the voyage discharges the underwriters from all loss, whether prior or subsequent.<sup>2</sup>

771 a. The doctrines relative to the *construction of express warranties and compliance therewith*, are illustrated by divers cases on *policies against fire*, as to the general rules of construction;<sup>3</sup> respecting non-compliance at the time for the risk to begin;<sup>4</sup> specifying buildings within a certain distance;<sup>5</sup> encumbrances, and statement of title;<sup>6</sup> the sale of the subject;<sup>7</sup> other insurance;<sup>8</sup> storing particular articles;<sup>9</sup> giving notice of a loss;<sup>10</sup> false affidavits.<sup>11</sup>

So the *jurisprudence of life policies supplies similar illustrations*: as to what is good health;<sup>12</sup> death by insanity;<sup>13</sup> usual medical attendant;<sup>14</sup> payment of premium;<sup>15</sup> naming medical attendant;<sup>16</sup> spitting of blood;<sup>17</sup> temperate habits;<sup>18</sup> having fits.<sup>19</sup>

### SECTION III. WARRANTY OF THE TIME OF SAILING.

772. Under a warranty that the vessel sailed, or will sail, on or before a certain day, a question arises in regard to what constitutes "a sailing" on the voyage,

*A vessel has "sailed" the moment she is unmoored and got under way, in complete preparation for the voyage, with the*

<sup>1</sup> Arnould, 1 Mar. Ins. 584.

<sup>2</sup> Relative to forfeiture of written contracts by non-compliance with conditions, in case of leases mostly, but having analogy to express warranties, see *Sanders v. Pope*, 12 Ves. Ch. 281; *Hill v. Barclay*, 18 Ves. Ch. 63; *Lloyd v. Collett*, Brown, Ch. 469, and *Belt's note*; *Reynolds v. Pitt*, 19 Ves. Ch. 134; *White v. Warren*, 2 Mer. Ch. 459; *Rolfe v. Harris*, 2 Price, Exch. 26; *Baxter v. Lansing*, 7 Paige, Ch. N. Y. 350; 2 Story Eq. Jur. s. 1315, 1320 et seq.; *Errington v. Aynsley*, 2 Brown Ch. 341; *Taylor v. Popham*, 1 id. 168.

*Eaton v. Lyon*, 3 Ves. Ch. 690; *Skinner v. Dayton*, 2 Johns. Ch. N. Y. 526; *Arnsby v. Woodward*, 6 Barnew. & C. 519; *Bouser v. Colby*, 1 Hare Ch. 109; *Harrington v. Wheeler*, 4 Ves. Ch. 686; *Bracebridge v. Buckley*, 2 Price Exch. 200.

<sup>3</sup> *Infra*. No. 866, 872, 873, 874, 875, 878.

<sup>4</sup> *Infra*, No. 870; <sup>5</sup> No. 872 a.; <sup>6</sup> No. 847 a.; <sup>7</sup> No. 880; <sup>8</sup> No. 881; <sup>9</sup> No. 883; <sup>10</sup> No. 886; <sup>11</sup> No. 888; <sup>12</sup> No. 894; <sup>13</sup> No. 895; <sup>14</sup> No. 898; <sup>15</sup> No. 897; <sup>16</sup> No. 898; <sup>17</sup> No. 899; <sup>18</sup> No. 900; <sup>19</sup> No. 901.

*purpose of proceeding to sea, without further delay at the port of departure.*

Lord Mansfield said: "To constitute a sailing under this warranty, the vessel at the time of sailing must be, in the contemplation of the captain, at absolute and entire liberty to proceed to her port of delivery in a mathematical line, if it were possible;"<sup>1</sup> referring probably to her being ready, so far as her preparations and equipments for the voyage are concerned.

A ship insured "at and from Jamaica to London, free from capture and restraints, and detainments of kings, princes, and people," and "warranted to sail on or before the 26th of July, 1776," was ready to sail, and would have sailed, on the 25th of that month, had she not been detained by an embargo laid by the order of the Governor of Jamaica, which was not raised until after the time when the ship was warranted to sail. The warranty was held to be not complied with.<sup>2</sup> In this case the delay was by a peril expressly excepted, which distinguishes it from some of those subsequently referred to.

A warranty to sail on or before a particular day is not complied with by leaving the harbor on that day, without having a sufficient crew on board, although the remainder of the crew are engaged, and ready to come on board.<sup>3</sup>

The rules of a mutual insurance association, which were part of the policy, defined "the time of clearing at the custom-house to be the time of sailing, provided the ship is then ready for sea," and the cargo and freight of a vessel were insured on time, warranted not to sail from Sligo, in Ireland, for British North America, after the 1st of September. The vessel had cleared at the custom-house on the 29th of August, and on the 30th dropped down the river with ten to fifteen tons of ballast, and anchored inside of the bar at the mouth of the river, and remained at her moorings there on the 31st, the weather being unfavorable. On the 1st of September she attempted to cross the bar, attended by boats with thirty-five tons of additional ballast, to be put on board after passing the bar, which the vessel crossed between eight and nine o'clock in the morning, being in time to put the ballast on board and sail on that day; but the vessel

<sup>1</sup> Thullusson v. Staples, Dougl. 351 n.

<sup>3</sup> Graham v. Barras, 3 Nev. & M.

<sup>2</sup> Hore v. Whitmore, Cowp. 784.

125.

having struck twice in crossing the bar, the master, deeming it not prudent to proceed without examining her bottom, put into a near harbor, and having found her not to be injured, put to sea on the 4th. Lord Tenterden, C. J. : " If a ship quits her moorings and removes only a short distance, being perfectly ready to proceed on her voyage, and is by some subsequent occurrence detained, that is a sailing ; but it is otherwise if, at the time when she quits her moorings and hoists her sails, she is not in a condition for completing her sea-voyage." It was accordingly held not to be a compliance with the warranty.<sup>1</sup>

773. *Whether, if a vessel is warranted to sail on or before a day named, and is completely ready to sail on that day, but is prevented from departing by stress of weather or other extraordinary inevitable peril or restraint, not excepted in the policy, and afterwards sails without unnecessary delay, the warranty is complied with ?*

This question is not free of difficulty, and the decisions upon it do not altogether harmonize.

A vessel insured from Demarara was " warranted to sail on or before the 1st of August." She sailed down the river about two miles on that day, ready to proceed to sea ; but, the tide being low, by advice of the pilot, anchored inside of the shoal at the mouth of the river, and did not proceed until the 3d. Lord Tenterden and his associates held this to be a sailing on the 1st.<sup>2</sup>

Under a warranty to sail from Jamaica for London on or before the 1st of August, with a stipulation for return of premium for convoy, the ship proceeded, on the 26th of July, out of the course to London, for Bluefields, in the same island, to join convoy there ; and, the convoy being detained by an embargo, did not proceed on the voyage with the vessel insured until after the 1st of August. Lord Mansfield, with the other judges of the King's Bench, held this to be a compliance with the warranty. He said it was a sailing for London by way of Bluefields.<sup>3</sup>

Under a similar warranty for the same voyage, the vessel sailed on the 1st from Savannah la Mer, for Bluefields, for convoy, and

<sup>1</sup> *Pittegrew v. Pringle*, 3 Barnew. & 495 ; 5 Dowl. & R. 393 ; 1 Carr. & P. Ad. 514. 171.

<sup>2</sup> *Lang v. Anderson*, 3 Barnew. & C. <sup>3</sup> *Bond v. Nutt*, Cowp. 601 ; Dougl. 344.



there waited until the 9th of August for the sailing of the convoy, which did not arrive there until that day, having been detained by an embargo. The master had expected to find the convoy ready to sail on his arrival at Bluefields. This was held by the same court to be a sailing from Jamaica on the 1st, Willes, J., dissenting.<sup>1</sup>

A French ship "warranted to sail from Guadaloupe on or before the 31st of December," for Havre, sailed from Point à Pitre, in that island, ready to pursue her voyage in October, with orders and an intention, however, to stop at Basseterre, in the same island; and in the course of the voyage to receive despatches, which the master expected to be ready. The vessel was detained there until the 10th of January, when it sailed with convoy, and was subsequently captured. Lord Mansfield, and the other judges of the King's Bench, held the sailing from Point à Pitre to be a compliance with the warranty, on the ground that the master did not expect to be detained at Basseterre.<sup>2</sup>

This liberal construction of the warranty in question is in contrast with the very literal one adopted by Lord Tenterden, in his instruction to the jury in a case where the master, being ready for the voyage, took up one of the two anchors by which the vessel was moored, and some of her sails were set, and she had been hauled about thirty fathoms of the length of the other cable on the 9th, being the day warranted, when, observing a heavy swell setting into the harbor, he deemed it dangerous to proceed, and delayed until the 11th. Lord Tenterden ruled this not to be a sailing on the 9th.<sup>3</sup>

Under a warranty in a time policy on the Cyclops, to sail on a voyage to America on or before the 15th of August, preparations were hastened, and the vessel was got ready to proceed on the voyage, and when the tide served, in the afternoon of that day, was hauled out of the dry dock in Dublin into the river Liffey, and down the river about half a mile, ready to proceed, the master knowing he could not then proceed on the voyage, being prevented by a strong wind blowing up the river, so that

<sup>1</sup> Earle v. Harris, Dougl. 357.

<sup>3</sup> Nelson v. Salvador, 1 Mood. & M.

<sup>2</sup> Thellusson v. Fergusson, Dougl. 309; Dans. & Ll. Cas. 219. 346, and same plaintiff v. Staples, Dougl.

351, n.

the sails could not be hoisted. On the next day she was warped further down, as far as she could be taken by warping, and sailed on the day following, the wind having become favorable. The claim for a loss came before the Court of Exchequer, where Lord Lyndhurst, C. B., said, that, if the master proceeded down the river "with the bonâ fide intention of placing the vessel in a more favorable situation in regard to the prosecution of the voyage," it was a compliance with the warranty; but not so, "if merely to comply with the letter of the warranty."<sup>1</sup> And on the case, after a new trial, coming on error before the Exchequer Chamber, Lord Denman said: "Considering that there was no distinct point of commencement pointed out in this policy, we think that the vessel was in the prosecution of the voyage" on the 15th, the jury having found, on the new trial, that she was warped down the river to be in a better position for the prosecution of the voyage, according to the distinction made by Lord Lyndhurst.<sup>2</sup>

The preceding cases will not, I think, all concur in any one general proposition, and that which seems to come nearest to reconciling them with each other is, that,

*If the risk has previously commenced under the policy, and the vessel is wholly ready to depart by the time warranted, so far as the fitting out, loading, manning, and clearing out, and all other preparations and preliminaries to the actual departure, depending upon the assured, are fully completed, and nothing hinders her sailing but some peril insured against by the policy, or which, if it had occurred at any subsequent stage of the voyage would not have discharged the underwriters, the warranty to sail is complied with, unless a different construction is expressly indicated by the policy.* Some of the preceding cases come distinctly within this proposition.

*But if the risk is to commence only at the sailing of the ship, and the assured is responsible for, and the underwriter free from, all preceding risks, perils, and losses, then the warranty is not complied with unless she actually sails within the time warranted.*

774. *A warranty not to sail from a certain coast, district, island,*

<sup>1</sup> Cockran v. Fisher, 2 Crompt. & M. R. Exch. 809; 5 Tyrw. Exch. 496; Exch. 581; 4 Tyrw. Exch. 424. and see Pittegrew v. Pringle, 3 Barnew.

<sup>2</sup> Cockran v. Fisher, 1 Crompt. M. & Ad. 514, stated supra, No. 772.

*or place before a certain time, is not violated by previously sailing from one port to another of the coast or district specified before the time :*

As in case of warranty not to sail from Jamaica, and, prior to the day named, sailing to a port to join convoy.<sup>1</sup>

775. *The warranty to sail from a coast or district on or before a certain day, requires sailing from the last port of loading, within the time.*<sup>2</sup>

But insurance from M., with liberty to touch at G., warranted to sail after the 12th, was ruled by Mr. Justice Buller not to have been complied with by sailing from the latter after that day.<sup>3</sup>

776. *Where the insurance is from an inland port, with warranty to sail by a certain time, the vessel must have its cargo and crew on board, and its clearance, and be ready to proceed on the voyage without further delay at any places that can be considered parts or branches of, or appendages to, the port named, and auxiliary to its navigation, though this may require dropping down a river, or navigating inland waters, to a considerable distance.*

It has been maintained, that the port of London extends to Gravesend, and that a vessel has not sailed thence until her departure from Gravesend, since vessels obtain their final clearances at Gravesend, and goods are not entitled to debenture until after the cocket, which is the last paper of clearance, is obtained at that place.<sup>4</sup> Thus where, on a license for the exportation of goods from the port of London before the 10th, the vessel cleared at London on the 9th, and at Gravesend on the 12th, the court held that this was not an exportation within the terms of the license.<sup>5</sup>

A vessel was insured from Savannah, and warranted to have "sailed early in October." She had cleared at the custom-house on the 15th of September, and dropped down the river about three miles to Five Fathom Hole, and afterwards about eleven miles to Cockspur, at both which places vessels of heavy

<sup>1</sup> Cruikshank v. Jansen, 2 Taunt. 301. See Vezian v. Grant, Park, 485.

<sup>2</sup> Wright v. Shiffner, 11 East, 515 ;  
<sup>2</sup> Campb. 247.

<sup>3</sup> Vezian v. Grant, Park, 485.

<sup>4</sup> Park, Ins. 497.

<sup>5</sup> Williams v. Marshall, 2 Marsh. 92 ;

1 Moore, 162 ; 6 Taunt. 390 ; 7 Taunt. 468.

burden finish their loading. She remained for some time at Cockspur, waiting for the recovery of the captain, who was sick on shore, and she finally sailed from that place on the 1st of October. Chief Justice Kent said: "The voyage did not commence till the vessel left Cockspur. She left the port of Savannah for a temporary purpose, distinct from the object of the voyage."<sup>1</sup>

A policy was made on goods and freight, at and from Pont-Neuf, on the river St. Lawrence, to London, with a warranty "to sail on or before the 28th of October." Pont-Neuf is about thirty miles above Quebec. It has no custom-house, and vessels going to sea from that place clear at Quebec. On the 26th of October the vessel, under the command of the mate, with a sufficient crew for the river navigation, but not for the voyage, dropped down from Pont-Neuf, and reached Quebec on the evening of the 28th. The captain had gone down to Quebec before, to get his papers at the custom-house. The crew was completed at Quebec, and on the 29th the captain obtained his clearance. He sailed on the 30th, not having been able to obtain a pilot on the preceding day. Lord Ellenborough: "The ship's dropping down to Quebec, without her complement of men, showed that that was only preparatory to the voyage. 'Warranty to sail on such a day,' must mean when the ship could get her clearances, and sail equipped for the voyage."<sup>2</sup>

777. *A warranty to "depart" from a port, means to leave it, not merely to get under way without leaving it.*

Insurance was made on a ship at and from Memel to England, "warranted to depart on or before the 15th." The vessel, with her clearances and cargo on board, and being completely ready for the voyage, hove up her anchor and got under way on the 9th, with the intention of proceeding. Before she had been half an hour under way, the weather changed, and she was obliged to come to anchor at the Haff, or river mouth, within the distance of half a mile from the sea, where she lay, with above thirty other ships, until the first opportunity for sailing, which was on the 21st. Gibbs, C. J.: "If this warranty had

<sup>1</sup> *Dennis v. Ludlow*, 2 Caines, N. Y. 111.

<sup>2</sup> *Risdale v. Newnham*, 3 Maule & S. 456.



been that the vessel should sail on or before the 15th, I should have thought that she had sailed. The warranty to sail meant that she shall commence her voyage. The decisions hitherto have been, that when a vessel got under way the warranty was complied with. But I think the word 'depart' must mean a departure from the port of Memel."<sup>1</sup>

778. *Insurance from a certain port "warranted in port" on a certain day, means in the port at which the risk commences.*

It was so ruled by Lord Tenterden under a policy on a ship at and from Hamburg, the ship being on the day named at Cuxhaven, in the territory of Hamburg, ninety miles below, and not considered by Lord Tenterden to be a part of that port. No clearance is necessary there.<sup>2</sup>

779. *Insurance from a port "where a vessel now is," means that she is there at the date of the insurance.*

It was so held by McCoun, Vice-Chancellor, in New York, on a bill to enforce an agreement to insure the profits of a cargo at and from Gibraltar, which had, in fact, together with the vessel, been there destroyed by fire before the date of agreement. The applicant insisted on his right to a policy, "lost or not lost."<sup>3</sup>

#### SECTION IV. WARRANTY OF CONVOY.

780. Another express warranty that frequently appears in the jurisprudence on English policies is that of convoy. There are divers acts of Parliament making provisions on this subject. In the United States no similar standing regulation has to my knowledge hitherto been made, and as convoy has rarely been provided by government, and has been in very little use, this warranty does not appear in American policies, and should it hereafter be introduced, it will probably be under laws and usages different from those of Great Britain.

<sup>1</sup> *Moir v. Royal Exch. Ass. Co.* 1 Scott, 4 Taunt. 660, and *Dalglish v. Marsh.* 576; 6 Taunt. 241; 3 Maule. Brooks, 15 East, 295.  
& S. 461; 4 Campb. 84.

<sup>3</sup> *Callaghan v. Atlantic Ins. Co.*

<sup>2</sup> *Colby v. Hunter*, 3 Carr. & P. 7; *Edw. Ch. N. Y.* 64.  
1 Mood. & M. 81; and see *Keyser v.*

This warranty is complied with by taking such convoy as is provided by the government for vessels bound on the voyage insured, and, if convoy is usually furnished for only a part of the voyage, it is no breach of the warranty to perform the remainder without any convoy.<sup>1</sup>

781. The vessel must not only sail with the convoy,<sup>2</sup> but *the captain must* also, either before, or at the time of sailing, *take sailing orders*, or directions as to keeping with the convoy, obeying signals, and the like, from the commander of the convoy, except, perhaps, where he is unavoidably prevented, without any fault on his part, from receiving such orders, in which case he must take the earliest opportunity of obtaining them.<sup>3</sup>

782. *If the vessel cannot sail fast enough to keep with the convoy, or is parted by a storm or other inevitable accident, it is not a breach of the warranty.*<sup>4</sup>

#### SECTION V. WARRANTY OF NEUTRAL PROPERTY, ITS FORM, IMPORT, AND CONSTRUCTION. — OWNERSHIP.

783. *A warranty that the ship or goods are neutral, or neutral property, is an engagement on the part of the assured, that it is owned by persons resident in a country at peace when the risk begins, and who have the commercial character of subjects of such country, and that it shall be accompanied with such documents, and shall be so managed and conducted by the assured and their*

<sup>1</sup> Bond v. Gonsales, 2 Salk. 445; Smith v. Readshaw, Park, 510; Hibbert v. Pigon, 3 Dougl. 224; Gordon v. Morley, 2 Strange, 1265; Lethulier's case, 2 Salk. 443; D'Eguino v. Bewicke, 2 H. Blackst. 551; Audley v. Duff, 2 Bos. & P. 111; Everard v. Hollingsworth, 2 Bos. & P. 111, n.; Campbell v. Bourdieu, 2 Strange, 1265; De Garey v. Clagget, Park, 511; Warwick v. Scott, 4 Campb. 62; Lilly v. Ewer, 1 Dougl. 72; Morrice v. Dillon, 2 Selw. N. P. 992.

<sup>2</sup> Taylor v. Woodness, Park, 510.

<sup>3</sup> Webb v. Thompson, 1 Bos. & P. 5; Victorin v. Cleeve, 2 Strange, 1250; Anderson v. Pitcher, 2 Bos. & P. 164; 3 Esp. 124; Waltham v. Thompson, 1 Marsh. 376; Verdon (cited Veedon in Abbott, Ship. p. 234) v. Wilmot, 3 Dougl. 74.

<sup>4</sup> Manning v. Gist, Marsh. 367; Simond v. Boydell, Dougl. 255; Jeffries v. Legendra, 4 Mod. 58; 2 Salk. 443; Laing v. Glover, 5 Taunt. 49.

*agents, as to be entitled, as far as depends on them, to all the protection and privileges of property belonging to the subjects of such country.*

*And so a warranty that the property is Dutch or American, or of any particular national character, is an engagement that it is owned by persons having the commercial character of Dutchmen or Americans, or of the subjects of such other nation, and that it shall be so documented, and so conducted by the assured and their agents, as not to forfeit, as far as depends on them, any of the advantages to which the property of the subjects of such nation is entitled.*

If the property insured is warranted to be American, at a time when the United States are at peace, it is precisely the same as a warranty of neutrality, and these two forms of warranting are used indifferently for the same purpose.

784. This warranty is, that the subject is neutral at the commencement of the risk, and that it shall continue to be neutral so far as depends upon the assured, or he is responsible.

If a declaration of war changes the character of the subject from neutral to belligerent, after the policy is made, the warranty is not thereby forfeited.<sup>1</sup>

785. *A statement of the fact that the property is neutral, whether incidentally or directly, whether as a part of the description of the property or in the form of warranting, will equally constitute a warranty.*<sup>2</sup>

786. *So the warranty of a fact necessarily implying the neutral or national character of the property, will have the same construction as a formal and direct warranty to this effect.* Where a policy effected in the United States contained the following note: "N. B. The vessel sails under a sea-letter;" it was held to be a warranty of American property.<sup>3</sup>

787. It has already appeared<sup>4</sup> that *the national character of any person, for all commercial purposes, depends upon his domicile, and he is taken to have the commercial character of the nation where he has his residence.*<sup>5</sup> What has been said in

<sup>1</sup> *Eden v. Parkinson*, Dougl. 732; <sup>3</sup> *Sleght v. Rhineland*, 1 Johns. Tyson v. Gurney, 3 Term, 477; Sa- N. Y. 192.

*Ioucci v. Johnson*, Park, 8th ed. 716.

<sup>4</sup> *Supra*, c. 2, s. 3.

<sup>2</sup> See the cases *passim*.

<sup>5</sup> *Ibid*.

regard to national character is applicable to the present subject, but need not be repeated. If property be insured as belonging to the subjects of any particular country, as Hamburgers, which is owned by the subjects of another, as Frenchmen,<sup>1</sup> or if it be warranted to belong to neutrals when it is owned by belligerents, the insurers are not bound by their subscription.

788. *Belligerent ownership of a part of the property insured, at the outset, will defeat the policy as to the whole.*<sup>2</sup>

789. *So far as ownership is concerned, the warranty of neutrality is applicable only to the interest insured.*

Where the assured, being neutrals, were part-owners of goods, the other part-owner being a belligerent, and the policy was intended to cover only the interest of the neutral part-owners, Chief Justice Marshall said: "The assured are not understood to warrant that the whole cargo is neutral, but that the interest insured is neutral."<sup>3</sup>

790. *Property held in trust by a neutral as collateral security for a debt due to a belligerent, or to be used and managed for his benefit, has a belligerent character.*

A vessel warranted American had been conveyed by John Bazing, an American, to Murray and Hart, Americans also, by a bill of sale absolute in its terms, but in fact in trust for Nathaniel Bailey, of Jamaica, a British subject and belligerent, as security for a debt due to him from Bazing; it was held that the warranty was not complied with. Mr. Justice Radcliff said: "A warranty of neutrality requires that the property should be wholly neutral. If one of the belligerents had an interest, whether partial or entire, the risk was thereby increased, and the warranty not complied with."<sup>4</sup>

Where insurance was on cargo, freight, and profits, warranted "American property," the warranty was held to apply to the freight and profits, as well as to the merchandise.<sup>5</sup>

<sup>1</sup> Skin. 327.

<sup>4</sup> Murray v. United Ins. Co. 2 Johns.

<sup>2</sup> Calbreath v. Gracie, 1 Wash. C. C. 219; and see Goold v. United Ins. Co.

N. Y. 168.

<sup>3</sup> Caines, N. Y. 73, infra, No. 798.

<sup>5</sup> Livingston v. Maryland Ins. Co. 6 Cranch, 274.

<sup>5</sup> Bayard v. Mass. Fire & Mar. Ins. Co. 4 Mas. C. C. 256; and see The Vigilantia, 1 C. Rob. Adm. 1; The Embden, 1 id. 16; The Vrow Hermina, 1 id. 163; The Endraught, 1 id. 19.



791. *Goods which a neutral has, during war, agreed to sell to a belligerent, and deliver in the country of the latter, have been held to be belligerent property while in transit; and if so, they would not answer to the warranty of neutral property.*<sup>1</sup> The reason given is, that the whole commerce of the belligerents, sustained by their contracts, might thus be carried on through neutrals; and the stronger belligerent naval power would thus be deprived of part of the advantage of its naval superiority. On the other hand, the neutral objects to being deprived of a kind of trade which is not of a character recognized by the law of nations to be contraband of war. *There are, accordingly, not wanting contrary decisions.*<sup>2</sup>

The discriminating circumstance is, that the price of the goods is at the risk of the vendee from the time of making the contract; for it is not a matter of doubt that the neutral may take his own goods to the market of either belligerent for sale at his own risk as to the state of the markets, as well as in all other respects. This seems to be a narrow basis for *the doctrine*, of which it is not unreasonable to say, *at least*, that it *ought to be limited to cases where* it appears that *the contract is made for the mere purpose of screening the goods from capture*, and this limitation allows a large belligerent right.

Sir William Scott even put this case upon a level with that of disguising belligerent goods as neutral, and not only condemned the goods shipped under such a contract, but also the other goods of the same shipper.<sup>3</sup> If it be conceded that such adjudications are founded in the law of nations, then the shipper thus forfeits his warranty of neutrality of such other goods.

792. *Goods shipped by a neutral under a contract with a belligerent during peace, but in contemplation of war, to be delivered at*

<sup>1</sup> *The Vrow Margaretha*, 1 C. Rob. Adm. 336; *The Atlas*, 3 id. 299; *The Sally*, 3 id. 300, n.; *The Anna Catharina*, 4 id. 107; *The Jan Frederick*, 5 id. 128; 1 Kent, Comm. 86, 5th ed.; *The Ann Green*, 1 Gall. C. C. 274; *The Francis*, 1 id. 450. See 1 Duer, Mar. Ins. 423, 428.

<sup>2</sup> See *Ludlow v. Bowne*, 1 Johns.

N. Y. 1; *De Wolf v. N. Y. Firemen's Ins. Co.* 20 id. 214; 2 Cow. N. Y. 56.

<sup>3</sup> *The Staadt Embden*, 1 C. Rob. Adm. 26; *The Jonge Tobias*, 1 id. 329; *The Sarah Christina*, 1 id. 237; *The Ringende Jacob*, 1 id. 89; *The Edward*, 4 id. 68; *The Ranger*, 6 id. 125; *The Mercurius*, 1 id. 288.

*his risk to the vendee in the country of the latter, are put upon the same footing as in case of such contract made during war.*<sup>1</sup>

793. *Where an agreement is made during peace, and without any contemplation of war, for the sale of goods, to be delivered by the vendor residing in one country, to a foreign vendee, residing in another, and before shipment of the goods, war breaks out between the country of the vendee and a third, whereby the shipment would be contraband, the shipment after notice of the war will not answer to a warranty of neutrality.*<sup>2</sup>

794. *Goods shipped by a belligerent in compliance with an order, or without an order, to be delivered to a neutral only on conditions and contingencies, other than the general right to stop in transitu, retain their belligerent character during the transit, and do not accordingly correspond to a warranty of neutral ownership.*<sup>3</sup>

795. *But where goods are shipped by a belligerent conditionally to become those of a neutral, and the latter complies with the condition before a capture, they thereby become from that time neutral property.*<sup>4</sup>

796. *If a shipper has despatched goods during peace, and while they are in transit, by the occurrence of war, he becomes a belligerent, he cannot screen them from capture by assigning them to a neutral for that purpose, and accordingly they will not thereby be made to correspond to a warranty of neutrality.*<sup>5</sup>

797. *The same rule will apply where goods are so assigned in anticipation of a war.*<sup>6</sup>

Sir William Scott condemned as enemy property goods consigned to a Dutch consignee, at the Cape of Good Hope, then

<sup>1</sup> The Packet de Bilbao, 2 C. Rob. Adm. 133; The Anna Catharina, 2 id. 112.

<sup>2</sup> See The Packet de Bilbao, 2 C. Rob. Adm. 134; The Anna Catharina, 4 id. 107, 113, n.

<sup>3</sup> The Aurora, 4 C. Rob. Adm. 218; The Josephine, 4 id. 25; The Carolina, 1 id. 305; The Frances, 8 Cranch, 335; The Venus, 8 id. 253; The Merrimack, 8 id. 317. See 1 Duer, Mar. Ins. 427, &c.

<sup>4</sup> The Cousine Marianne, 1 Edw. Adm. 346.

<sup>5</sup> The Vrow Margaretha, 1 C. Rob. Adm. 336; The Carl Walter, 4 id. 207; The Jan Frederick, 5 id. 128. Whether such is the object of the transfer is to be gathered from the circumstances.

<sup>6</sup> The Jan Frederick, 2 C. Rob. Adm. 128; The Francis, 1 Gall. C. C. 445; 8 Cranch, 335. 9 id. 289.

a colony of the enemy; but before the capture of the goods, the colony had been captured, and the inhabitants had sworn allegiance to Great Britain. That is, though the owner changes his national character during the transit of the goods, the national character of his property in transit does not change.<sup>1</sup>

798. *Where the warranty of neutrality in a policy is forfeited by the act of the assured, as to part of the subject insured, it is a forfeiture of the entire policy.*

As where, after capture and before condemnation, the assured assigned half of his interest to a belligerent assignee, though for the purpose of preventing its condemnation.<sup>2</sup>

799. The warranty is, that the property is neutral at the beginning of the risk, and shall continue to be so, as far as this depends on the assured or his agents. But *if he becomes a belligerent, or the property assumes a belligerent character immediately after the risk commences by an act of his government, or that of any other government, it is not a breach of the warranty.* This is one of the risks taken by the insurers.<sup>3</sup>

#### SECTION VI. ORIGIN OF PROPERTY WARRANTED NEUTRAL.

800. Some property is impressed with a belligerent character by its origin. Jurisprudence has never gone the length of maintaining that the produce of the opposite belligerent country, or its colonies, has a lasting belligerent character on account of its origin independently of the ownership, but it has been held that the *produce of a plantation owned by a neutral in a colony of a belligerent, retains its belligerent character while in transitu* on any maritime destination, whether to a neutral country or a belligerent one, while it remains the property of such planter.<sup>4</sup>

<sup>1</sup> The *Dunckbaaf Africaan*, 1 C. Rob. Adm. 107. But he rested his decision wholly upon a previous one of the Lords of the Privy Council *Negotie en Zeevaart*, stated by him, id. 111, and apparently against his own opinion; as it well might be, for it is surely a very singular doctrine that confiscates the property of one who has become a subject by con-

quest, merely because it happens to be afloat. See 1 Duer, Mar. Ins. 437.

<sup>2</sup> *Goold v. Universal Ins. Co.* 2 Caines, N. Y. 73.

<sup>3</sup> *Eden v. Parkinson*, Dougl. 732; *Garrels v. Kensington*, 8 Term, 230; *Saloucci v. Johnson*, 4 Dougl. 224.

<sup>4</sup> The *Phoenix*, 5 C. Rob. Adm. 20; The *Maastrom* and *Juffrow Catharina*,

It does not appear why the same rule is not as applicable to the produce of the home territory of the belligerent, though it has not, that I am aware of, been so applied.

801. The produce or other property derived from a belligerent country or its dependencies during war, usually becomes neutral on its coming to be absolutely owned by a neutral, and being entirely disengaged from belligerent trade, protection, and use. Still its origin in a belligerent country is of weight, as the ground of presumption of its belligerent character, and of imposing upon the neutral claimant the burden of more decided proof of its being neutral, as will appear subsequently.

SECTION VII. DOCUMENTS, PROOFS, AND INSIGNIA, OF NEUTRAL PROPERTY.

802. *Under a warranty of the neutrality, the ship or goods must not only be owned by neutrals, and not be of a belligerent character in themselves, but they must also be accompanied by sufficient tokens and documents to show that they are entitled to be respected as neutral property.*

What evidence is requisite in this respect depends upon the law of nations, and the laws and treaties of the country to which the ship and the owner of the property belong. It cannot be said precisely what documents will be sufficient to answer the warranty, since the municipal regulations and treaties of a country are liable to change. The warranty requires, in general, that the ship or cargo should be accompanied with unequivocal evidence of its national character.<sup>1</sup>

803. *The bill of sale of the ship must correspond to the warranty.*<sup>2</sup>

804. *The flag is the most obvious badge of the national character of the ship, and by the law of nations the ship is liable to*

5 id. 21; *The Vrow Anna Catharina*, 5 Goix v. Low, 1 Johns. Cas. N. Y. 341; id. 161. 3 Dougl. 126; *Barzillay v. Lewis, Park.*

<sup>1</sup> *Coolidge v. N. Y. Firemen's Ins. Co.* 14 Johns. N. Y. 308; *Higgins v. Caines*, N. Y. 549.

*Livermore*, 14 Mass. 106; *Barker v. Phoenix Ins. Co.* 8 Johns. N. Y. 307; <sup>2</sup> *The San Jose Indiano*, 2 Gall. C. C. 268.



be considered as belonging to the nation indicated by its flag.<sup>1</sup> A ship warranted neutral must therefore bear no other than the flag of a nation that was neutral at the commencement of the risk, and one warranted of any particular national character must bear no other flag than that of the nation to which the warranty relates.

805. *A vessel warranted neutral must have the usual certificate of its national character.*

The sea-letter or pass is one of the usual documents for this purpose; which is a certificate granted, directly or indirectly, by the supreme authority of a nation, declaring that the ship sails under the protection of such nation, and expressly or by implication giving notice to all people that she is to be so regarded. The national character of the vessel is therefore explicitly avowed by the sea-letter, and it is not permitted to disown the character thus formally assumed.<sup>2</sup>

In a policy on goods from New York to New Orleans, the assured warranted that "the vessel sailed under a sea-letter." The vessel had on board a certificate of the collector and naval officer of the port of New York, stating that the assured had made oath that the vessel was wholly owned by himself and other American citizens. The assured offered to prove that this certificate was commonly understood and known in New York as a sea-letter. On behalf of the underwriters it was insisted, that the laws and treaties of the United States defined a sea-letter to be a paper under the seal of the United States. The form of this paper had been prescribed in the treaty of 1778 with France, of 1782 with the Netherlands, and of 1795 with Spain, where it is called a sea-letter.

By an act of Congress of 1796,<sup>3</sup> the Secretary of State was authorized to prepare the form of a passport. Under this law the same form was adopted which had been agreed upon in the above treaties. By another act of Congress,<sup>4</sup> it was provided

<sup>1</sup> The Success, 1 Dods. Adm. 131; 36, for the form agreed upon by the United States and Holland, in 1782; The Vrow Elizabeth, 5 C. Rob. Adm. 2.

<sup>2</sup> The Vigilantia, 1 C. Rob. Adm. 1; and p. 58, for that agreed upon by The Vreede Scholtys, 5 id. 5, n. See Great Britain and Russia, in 1801.

<sup>3</sup> Laws U. S. Vol. II. c. 339.  
<sup>4</sup> Laws U. S. Vol. III. c. 329.

6 Wheat. App. 12, for what is considered to be a sea-letter in France; p.

that every unregistered vessel owned by citizens of the United States, and sailing with a sea-letter, should, at the request of the master, be furnished by the collector with a passport of the form adopted in pursuance of the preceding act. This last act makes a distinction between a sea-letter and a passport. The court, however, understood a passport and sea-letter to be the same document, the form of which they held to be so definitely settled by the treaties above mentioned, and the act of 1796, that no parol evidence could be admitted to show that any other document was to be understood as a sea-letter within the warranty.<sup>1</sup>

The Court of Errors, however, reversed this decision, and permitted the parties to prove what was understood in New York by the term "sea-letter;" and it appeared by the evidence, to be the certificate of the collector and naval officer.<sup>2</sup>

It cannot be requisite that a vessel warranted neutral, or of any particular national character, must in all cases, to comply with the warranty, have a sea-letter corresponding to it; since it depends upon the government of a country to give such letter. The warranty can only require that the vessel shall have such documents to show its national character as the government will furnish, or the owners can procure. But as it is a very general practice of governments to provide, in time of war, for granting sea-letters to vessels, the warranty will, in general, be equivalent to a stipulation that the vessel shall be supplied with this document. And where the government would furnish it if applied for, and it is usual to have it on board, it is a breach of the warranty to be without it.

806. *The register is an important document under this warranty*, as it shows to whom and to what port a vessel belongs, and is certified by some officer of the customs, and accordingly bears with it some stamp of public authority.

This document and the sea-letter constitute the most material proof of the national character of the ship. But it depends on the laws, and usages, and treaties of a country, whether either of them is absolutely necessary under a warranty of national character. Where a vessel warranted American had a sea-letter, but

<sup>1</sup> *Sleght v. Rhineland*, 1 Johns. N. Y. 192.

<sup>2</sup> *Sleght v. Hartshorn*, 2 Johns. N. Y. 531.

no register, this was held to be a compliance with the warranty.<sup>1</sup>

Mr. Justice Thompson, of New York, remarks, that the register of the ship is the only document necessary to be on board, in order to comply with the warranty of national character, in time of universal peace.<sup>2</sup>

807. *The bill of sale, charter-party, instructions to the master, shipping-paper, muster-roll or role d'equipage, and log-book*, must show, as far as they exhibit any proofs, that the vessel is of the national character warranted.

808. Under this warranty, the cargo must be accompanied by proof of its national character; *the invoices, bills of lading, the letters relating to the goods, and the certificates of consuls* or other officers, must all be consistent with, and confirm, the warranty.<sup>3</sup>

Belligerent nations have not a right to prescribe to neutrals by what vouchers their title to their property shall be authenticated. But the right of throwing the burden of proof upon the neutral is conceded to them by general usage, or, in other words, by the law of nations. By declaring war against each other, they seem, by general consent, to acquire the right of demanding of neutrals the proof that their property on the ocean is entitled to exemption from capture. Under this warranty, therefore, the property must be accompanied by documents of some description, and sufficiently authenticated, to prove beyond a reasonable doubt that the property is of the national character warranted.

809. If property insured, and warranted neutral, is documented, and on capture claimed, as belligerent, the warranty is thereby forfeited.<sup>4</sup>

Chief Justice Marshall says: "that in general *the concealment of papers amounts to a breach of the warranty*;"<sup>5</sup> and carrying a material paper written in sympathetic ink seems to be equivalent to a concealment of papers.<sup>6</sup>

Goods were insured from Baltimore to Bourdeaux, in 1806,

<sup>1</sup> *Barker v. Phoenix Ins. Co.* 8 Johns. N. Y. 307.

<sup>2</sup> *Catlet v. Pacific Ins. Co.* 1 Paine, C. C. 594.

<sup>3</sup> *Griffith v. Ins. Co. of North America*, 5 Binn. Penn. 464; *Siffken v. Lee*, 5 Bos. & P. 484.

<sup>4</sup> *Calbreath v. Gracie*, 1 Wash. C. C. 219.

<sup>5</sup> *Livingston v. Maryland Ins. Co.* 7 Cranch, 536.

<sup>6</sup> *Carrere v. Union Ins. Co.* 2 Hall, Law Jour. 197; 3 Harr. & J. Md. 324.

warranted American property. Some papers relating to a former shipment were concealed in a cask on board, and those papers were referred to in a letter written upon another in sympathetic ink, and the papers were such as to throw a mystery over the shipment, and raise a doubt as to its national character, though they were subsequently explained to the court, by the assured, consistently with the warranty. It was held, however, to be a breach of the warranty.<sup>1</sup>

If a cargo warranted neutral be accompanied with simulated papers, giving it the appearance of being the property of belligerents, though such papers are taken merely for the purpose of evading the municipal regulations of trade of a belligerent, which is held to be justifiable, yet the cargo is liable to be considered by the other belligerent as of the assumed national character; or is in so great danger from this cause, that the use of such papers is held to be a violation of the warranty of neutrality.<sup>2</sup>

But if leave be given in the policy to carry simulated papers, it is not a breach of the warranty to have them on board.<sup>3</sup> And Chief Justice Marshall says, that when the underwriters know, or ought to know, that, by the usage of the trade, two sets of papers are carried to protect the property, they impliedly consent to the usage, and the set of papers which will protect the property when its national character is called in question, is to be produced.<sup>4</sup>

810. *If the master of a neutral ship covers belligerent property on board as neutral, it is a forfeiture of the neutrality of the ship.*<sup>5</sup>

The disguising of belligerent goods by the master, even though without the consent or knowledge of the ship-owner, has been held to be a forfeiture of the neutrality of the part of the cargo belonging to the ship-owner, the acts of the master in this respect being held to be imputable to the ship-owner.<sup>6</sup>

<sup>1</sup> *Carrere v. Union Ins. Co.* 3 Harr. & J. Md. 324.

<sup>2</sup> *Horneyer v. Lushington*, 15 East, 46; *Oswell v. Vigne*, id. 70; *Blagge v. New York Ins. Co.* 1 Caires, N. Y. 549. Sir James Mansfield makes a query whether a neutral vessel may carry simulated papers. *Steel v. Lacy*, 3 Taunt. 285. Mr. Park, p. 531, says this query is answered by the above cases in East.

<sup>3</sup> *Bell v. Bromfield*, 15 East, 364.

<sup>4</sup> *Livingston v. Maryland Ins. Co.* 7 Cranch, 506.

<sup>5</sup> *Schwartz v. Ins. Co. of North America*, 3 Wash. C. C. 117; 3 id. 276; *Clarkson v. Philadelphia Ins. Co.* 1 Browne, Penn. 152.

<sup>6</sup> *Phoenix Ins. Co. v. Pratt*, 2 Binn. Penn. 308. See also *The Fortuna*, 3 Wheat. 245.



811. *The forfeiture of neutrality by the ship-owner or captain, does not forfeit the neutral character of goods shipped by another neutral, and duly documented as such.*

812. *Where goods are shipped in time of peace, and documented as of another national character than their real one, but without any reference to neutral or belligerent rights, or the breaking out of a war, and the nation whose character is assumed becomes party to a war, the property may be vindicated as neutral.*<sup>1</sup>

813. *The law of nations in regard to what is to be considered neutral property, and in regard to the conduct necessary to secure it respect as such, is liable to be controlled by treaty, since nations may substitute express rules for those implied obligations which the general law imposes without any stipulation. And modifications of the law of nations in these respects have been made in many different treaties.*<sup>2</sup>

In the treaty with France, 1778, it was stipulated, that, in case of war, if the sea-letters of the vessels of the neutral party should express "the place of habitation of the master," they should not be molested by the other. The Mount Vernon, being insured in England and warranted American, had a sea-letter running as follows: "Permission has been granted to D., master of the ship Mount Vernon, of Philadelphia, of the burden," &c. Lord Ellenborough said, the name of the town in the passport referred to the ship, not to the master, and that the vessel, not being navigated according to the treaty, had forfeited her neutrality, being at least subject to detention by French cruisers.<sup>3</sup>

#### SECTION VIII. WARRANTY OF NEUTRAL PROPERTY REQUIRES NEUTRAL TRADE, EMPLOYMENT, AND CONDUCT.

814. In case of property belonging to a partnership consisting of neutral and belligerent members, so far as it is affected by the

<sup>1</sup> The Vreede Scholtys, 5 C. Rob. powers; Laws of U. S. Vol. I. ed. of Adm. 5, n.; and see The Ann Green, 1815; Treaty of U. S. and France, 1 Gall. C. C. 274. 1778; Rich v. Parker, 7 Term, 705.

<sup>2</sup> Answer to the Prussian Memorial, Col. Jurid. Vol. I. p. 137. See treaties of the United States with European <sup>3</sup> Baring v. Christie, 5 East, 398. See also Baring v. Claggett, 3 Bos. & P. 201, on the same facts. The case

ownership merely, the interest of the neutral partners is neutral, and that of the belligerent partners is belligerent.<sup>1</sup>

The locality of a house affects its trade. *The interest of a neutral partner in a house of trade established in a belligerent country is belligerent.*<sup>2</sup>

But the interest of the same neutral partner or partners in the business of a commercial house in a neutral country will still be neutral, notwithstanding such belligerent interest in another establishment.<sup>3</sup>

815. *Where the ship, goods, or any insurable interests of a neutral, by their insignia, locality, employment in trade, or use, are mixed up and identified with the property and interests of one of the belligerents, the same are subject to be treated according to their apparent character as enemy property by the other,<sup>4</sup> and accordingly will not correspond to a warranty of its neutrality.*

Property despatched to a neutral in pursuance of a contract with a belligerent government, or employed by him in a trade for which a privilege is given by a belligerent, does not answer to a warranty of neutrality.<sup>5</sup>

The freight of a neutral vessel for carrying a belligerent cargo, the vessel not being chargeable with unneutral conduct, is neu-

turns upon the vessel's not being entitled to a register, from which Lord Alvanley and the other judges supposed she was not entitled to the privileges of an American vessel. Chief Justice Kent supposes, 8 Johns. N. Y. 320, that Lord Alvanley did not know of any other act of Congress than that of 1792, on this point, and seems to think that his opinion would have been different had he known of that of 1802, giving vessels not entitled to a register, but owned by citizens of the United States, all the advantages of national protection. See also *Baring v. Royal Exch. Ass. Co.* 5 East, 99.

<sup>1</sup> The *Jacobus Johannas*, before the Lords of Appeal, 1785; The *Ospray*, before the same tribunal, 1795; both cited 1 C. Rob. Adm. 14; The *Vigilantia*, 1 id. 1.

<sup>2</sup> The *Susa*, 2 C. Rob. Adm. 251; The *Portland*, 3 id. 41; and The *Herman*, 4 id. 228. See The *San Jose Indiano*, 2 Gall. C. C. 268; *Society, &c. v. Wheeler*, 2 id. 105.

<sup>3</sup> The *Antonia Johanna*, 1 Wheat. 159; The *Indiana*, 3 C. Rob. Adm. 44; The *Herman*, 4 id. 228.

<sup>4</sup> The *Princessa*, 2 C. Rob. Adm. 49; The *Anna Catharina*, 4 id. 107; The *Rendsborg*, 4 id. 121; The *Vrouw Anna Catharina*, 5 id. 15; 2 Wheat. App. 29; The *Susa*, 2 C. Rob. Adm. 251; The *Ann Green*, 1 Gall. C. C. 274; The *San Jose Indiano*, 2 id. 268; The *Phoenix*, 5 C. Rob. Adm. 20; The *Carolina*, 4 id. 256; The *Edward*, 4 id. 68.

<sup>5</sup> The *Anna Catharina*, 4 C. Rob. Adm. 107.

tral, and is allowed in case of the capture and condemnation of the cargo.<sup>1</sup>

816. *Whether all the monopolized trade of the ports or territory of a nation retained to its citizens during peace, is interdicted to neutrals in time of war?*

There is a diversity of decisions by admiralty tribunals, and of opinions of jurists and statesmen, as to the particular circumstances whereby the property of a resident in a neutral country is liable to be treated as that of an enemy.

According to the opinion of Sir William Scott, and other British admiralty judges, the products of a belligerent country or its colonies, acquired by a neutral in the place of their origin, to be transported in the coasting or colonial trade of such country by him on his own account and risk, are to be regarded by the other belligerent during its transit as being enemy property, and liable to capture and condemnation as such.

The American government, tribunals, and statesmen oppose that doctrine.

The British tribunals allege in support of their position, that, according to the general policy of nations, each country confines its colonial and coasting trade to its own subjects, and it is only when any country is exposed to capture by the naval forces of its enemy, that it admits a neutral into such trade. They do not pretend that the rights and extent of the trade of a neutral country with their enemy are to remain unaffected by the war, for, as we have seen, it is curtailed at once of the whole trade that is thus rendered contraband of war.

On the side of the neutral, it is urged that, as he is subject to all the disadvantages and privations, he is justly entitled to all the advantages, that are merely incidental and consequential to a state of war between other nations; that it is not possible to say what privileges he might have had in the coasting or colonial trade of either belligerent, if peace had continued, and therefore the assumption that he would have still continued under the same restrictions as before, is not well founded.

He insists that a coöperation with either belligerent in prosecuting the war is the only intercourse of which he is curtailed by

<sup>1</sup> The *Antonia Johanna*, 1 Wheat. 159; and admiralty jurisprudence *passim*.

the law of nations, that is, that all species of trade, excepting contraband, remain open and subject to be prosecuted by him in the same manner as they might have been, the parties consenting, had there been no war.<sup>1</sup>

*The question is one that must be left to be settled by international stipulations and mutual concessions, or the right of the strongest; for in such a multifarious complexity of relations, interests, and facts, it cannot be expected that general principles can be brought to bear with sufficient force to reconcile the conflicting pretensions.*

817. *Produce of a colony of a belligerent country being once exported to a neutral country, and there landed in the regular course of trade, is agreed on all sides to have no longer a belligerent character, on account of its origin, or on account of the trade of the colony having been restricted to the citizens of the belligerent country in time of peace.*

Property being warranted Dutch, and taken on board at St. Eustatia, it was suggested that a part of it had been brought from French islands, then belligerent, and put on board of the vessel from the boats in which it had been brought, without having been landed at all at St. Eustatia. Lord Mansfield: "It is now a settled point, that it is the same thing as if it had been landed on the Dutch shore and put on board afterwards," in which case he implies that there could be no doubt of its neutrality.<sup>2</sup>

This construction seems to have been more liberal towards the neutral character of the goods than some of the subsequent jurisprudence in Great Britain.

If a vessel bringing produce from a belligerent colony merely enters a neutral port without unloading, and proceeds thence with its cargo to a subsequent destination, the passages previous and subsequent to the entry at such neutral port are parts of one

<sup>1</sup> See Mr. Monroe's Letter to Lord Mulgrave, September 23, 1805; and Mr. Madison's Letter to Messrs. Monroe & Pinckney, May 11, 1806, cited 1 Duer, Ins. p. 701. See also Mr. Duer's remarks, *id.*; The Snip, before the Lords of Appeal, cited 1 Wheat. App. 515;

Vasse v. Ball, 2 Dall. Penn. 270; Wait's State Papers, 1806, and subsequently; remarks of Story, J. in The Ann Green, 1 Gall. C. C. 274, at p. 289.

<sup>2</sup> Berens v. Rucker, 1 W. Blackst. 313.



voyage, and the cargo still retains the national character of the place of its origin.

This doctrine is a corollary from that previously stated, namely, that a belligerent nation cannot, during a war, change the national character of its trade by any indulgence granted to neutrals, so as to abridge the rights of the antagonist belligerents to make prizes. This doctrine runs through the British admiralty jurisprudence.

818. The public armed ships of a belligerent have a right to bring to and search neutral merchant-vessels, that is, to go on board of them and examine the ship's papers and those relating to the cargo, and put questions to the captain or other officers touching the neutral character of the property, and, in general, to examine the property, the papers by which it is accompanied, and the persons having charge of it, for the purpose of ascertaining whether it is belligerent or neutral.

*A resistance of search that is legally demanded, is a breach of the warranty of neutrality.*<sup>1</sup>

This right is sometimes conceded with reluctance by neutrals, and as often enforced with rigor by belligerents. It has been rendered so inconvenient, that many attempts have been made to limit and regulate its exercise, particularly by Prussia, Holland, and Sweden, about the middle of the last century,<sup>2</sup> and again in 1780 by Russia and the other members of the Armed Neutrality.

819. *The secreting or disguising of property by a neutral, for the purpose of infringing upon, evading, or preventing the exercise of, the rights of either belligerent as such, not only leaves the ship, of which the national character is so falsified, or the other property so secreted or disguised, exposed to seizure and condemnation, but also exposes the other property of the neutral, which is implicated in the same attempt or adventure, to seizure and*

<sup>1</sup> *M'Lellan v. Maine Fire & Mar. Ins. Co.* 12 Mass. 246; *Snowdon v. Phoenix Ins. Co.* 3 Binn. Penn. 457; *Robinson v. Jones*, 8 Mass. 536; *The Mars*, 6 C. Rob. Adm. 79; *The Pennsylvania*, 1 Act. Prize Cas. 33; *The Pizarro*, 2 Wheat. 227; *The Maria*, 1 C. Rob. Adm. 340; *Garrels v. Kensington*, 8 Term, 230; *The Marianna Flora*, 11 Wheat. 43; *The Romeo*, 6 C. Rob. Adm. 351.

<sup>2</sup> *Collect. Jurid.* Vol. I. p. 144; Answer to the Prussian Memorial, 1 C. Rob. Adm. 305, n.

condemnation by the belligerent, and is a breach of the warranty of neutrality in reference to the latter no less than the former.<sup>1</sup>

As, by resisting search, or attempt to rescue;<sup>2</sup> shipping a cargo in a public armed belligerent ship,<sup>3</sup> or sailing under convoy of a belligerent;<sup>4</sup> unless it is for the purpose of avoiding a seizure in outrageous violation of the law of nations by the antagonist belligerent, as in the case of Bonaparte's Milan Decree,<sup>5</sup> which resistance rests upon the right of defence of grossly illegal violence.

A warranty that a vessel is neutral is not forfeited merely by the supercargo being a belligerent subject.

So held of a neutral Portuguese ship, having an English supercargo, England being (1781) at war with France.<sup>6</sup>

820. It is not easy to say precisely what acts may be lawfully done in the exercise of the right of search. Hubner thinks it should be confined to the examination of the papers.<sup>7</sup> But it has not been so limited in practice; and in considering the liability of the captors to pay costs and damages for the abuse of this right, courts have permitted them, in justification of their conduct in detaining neutral vessels, to give evidence of every circumstance that came to their knowledge, tending to throw suspicion upon the national character of the property.

The principle acted upon seems to be, that *the belligerent cruiser may, when its character and commission are made known, take every reasonable means, without using any unnecessary force or violence, to ascertain the national character of the vessel and cargo, and if any circumstance, from whatever source a knowledge of it may be obtained, gives a reasonable ground to doubt the neutral character of the property, it will justify a detention of the vessel.* But where the manner of making search is regulated by treaty, as it has been in some of the treaties of the United States with foreign powers, the express stipulations of the parties will determine what is a legal mode of search.

<sup>1</sup> The Eliza & Katy, 6 C. Rob. Adm. 185.

<sup>2</sup> Ut supra.

<sup>3</sup> The Fanny, 1 Dods. Adm. 443.

<sup>4</sup> The Maria, 1 C. Rob. Adm. 340; The Joseph, 1 Gall. C. C. 545; 8 Cranch, 451; The Julia, id. 181; 1

Gall. C. C. 594; The Sampson, 1 C. Rob. Adm. 346.

<sup>5</sup> Snowdon v. Phoenix Ins. Co. 3

Binn. Penn. 457.

<sup>6</sup> Mayne v. Walter, 3 Dougl. 79.

<sup>7</sup> Hubner, chap. 2.

821. It seems to be implied, in many cases, that neutrals are obliged to submit to be searched, and detained at the discretion of a known belligerent. Chief Justice Parsons says: "The belligerent having a right, by the law of nations, to visit and search neutral vessels to prevent them from entering or leaving a port under lawful blockade; to seize and detain them if engaged in contraband trade, or violating a blockade; and to capture and carry into port neutral vessels, which may be transporting the property of his enemy, for the purpose of condemning such property;— it would be utterly inconsistent with these rights to allow the neutral to resist by force, or be retaken by her crew, whenever they might have opportunity to overpower the officers and men of the belligerent, in whose custody she might be placed. General principles of policy require that in such cases the neutral should submit and rely upon the justice of the tribunals of the belligerent nation."<sup>1</sup>

Similar language is held in many cases, from which it appears plainly that *the power to resist, or opportunity to escape, does not lessen the obligations of a neutral to submit to search.* This seems to be the principle to which the preceding, and other like observations, are applicable; for, it can hardly be supposed that the neutral is bound to submit to all acts done by a belligerent, under a pretence of exercising a right of search, though the belligerent make known his character and produce his commission. It is a general principle, that the unlawful exercise by force of a legal right, will justify a resistance. As to the discretion of the parties, each has the same, and neither can alter the rights, powers, or obligations of the other, by the construction he puts upon them. The belligerent uses his discretion as to the manner of searching, and the neutral as to the right or expediency of resisting or escaping; but still it remains for the proper tribunals to determine what were, in truth, the rights and obligations of the parties.

822. The right of visit and search includes that of sending vessels into port for examination; and *a rescue of, or attempt to rescue, a neutral vessel sent in for examination by an authorized belligerent captor, is a breach of this warranty.*<sup>2</sup>

<sup>1</sup> Robinson v. Jones, 8 Mass. 536.

340; The Dispatch, 3 id. 278; Garrels

<sup>2</sup> Wilcocks v. Union Ins. Co. 2 Binn.

v. Kensington, 8 Term, 230.

Penn. 574; The Maria, 1 C. Rob. Adm.



823. *If a belligerent exercises the right of search illegally, and outrageously, it is not a breach of the warranty of neutrality to make resistance.*

It was so decided in case of an American vessel captured by a lugger in the English Channel, near the French coast. The prize crew were proceeding with the vessel towards a French port, when the American crew rose upon them and regained possession of the vessel, but were obliged to abandon her, in their boat, on the lugger's again appearing in sight and giving chase to them. The lugger had neither shown any colors nor made known the authority by which a right of search was demanded. This was held to be a sufficient justification of resistance. Mr. Justice Jackson, giving the opinion of the court, said, that to refuse the right of resistance and escape in such case "would expose every neutral ship to capture by pirates. The master of the neutral vessel had no evidence that the capturing ship was a French commissioned cruiser. The captors might have plundered the ship and sunk her, and neither the owners nor the government of the United States could demand indemnity against the French government."<sup>1</sup>

Chief Justice Tilghman instructed the jury, in regard to a neutral vessel captured and sent in for adjudication, that it was not the duty of her crew to navigate her.<sup>2</sup>

824. *It is not a breach of the warranty of the neutral character of the ship, that she carries a belligerent cargo.*<sup>3</sup>

*The warranty of neutrality of goods is not forfeited by the circumstance of their being transported on board of an unarmed belligerent ship.*

Chief Justice Marshall says: "The rule that the goods of an enemy found in the vessel of a friend are a prize of war, and that the goods of a friend in the vessel of an enemy are to be restored, is believed to be a part of the original law of nations as generally, perhaps universally, acknowledged. It has been fully and unequivocally recognized by the United States. And it was held, that the provision of the treaty of the United States with Spain, that 'free ships should make free goods,' was not a ground

<sup>1</sup> M'Lellan v. Maine Fire & Mar. Ins. Co. 12 Mass. 246.

<sup>2</sup> Wilcocks v. Union Ins. Co. 2 Binn. Penn. 574.

<sup>3</sup> Barker v. Blakes, 9 East, 283.



for considering all goods that were claimed as Spanish, but found on board of an armed hostile vessel, to be, for this reason merely, enemy property."

Mr. Justice Story said: "The general doctrine, though formerly subject to many learned doubts, is now incontrovertibly established, that neutral goods may be lawfully put on board of an enemy ship, without being prize of war."<sup>1</sup>

825. *The employment of a neutral vessel in a service auxiliary to the hostile operations of a belligerent, forfeits its neutral character.*<sup>2</sup>

Such is the effect, according to Sir William Scott, even though the master may engage in such service without being aware of its belligerent character.<sup>3</sup>

But this is an extremely stringent construction against the neutral. The doctrine surely ought to be limited to cases where the circumstances constitute a ground of presumption of his being aware of the nature of the service, as they in fact did in those where the doctrine is stated. That is to say, if it is the gross negligence of the master not to have notice of the belligerent character of the service, he shall be presumed to know it. And this limitation of the doctrine is distinctly recognized by the same eminent jurist, in the case of conveyance of the despatches of one of the belligerents.<sup>4</sup>

The carrying of despatches for one belligerent, subjects the vessel to capture by the other.<sup>5</sup> Despatches between a minister of a belligerent in a neutral country, and his own government, are, as far as the master of the neutral ship conveying them is concerned, conclusively presumed not to be of a belligerent character, and so the conveyance of them is no breach of warranty of a neutrality.<sup>6</sup>

<sup>1</sup> *The Nereide*, 9 Cranch, 388. See *Kemble v. Rhineland*, 3 Johns. Cas. N. Y. 130.

<sup>2</sup> *Bentzon v. Boyle*, 9 Cranch, 191; *The Carolina*, 4 C. Rob. Adm. 256; *The Friendship*, 6 id. 420.

<sup>3</sup> *The Orozembo*, 6 C. Rob. Adm. 430; *The Friendship*, 6 id. 420; *The Susan*, 6 id. 461, n.

<sup>4</sup> *The Caroline*, 6 C. Rob. Adm.

461; *The Rapid*, Edw. Adm. 228; *The Atalanta*, 6 C. Rob. Adm. 440; *The Constantia*, Holbec, 6 id. 461, n.; *The Susan*, *ibid.*

<sup>5</sup> *The Atalanta*, 6 C. Rob. Adm. 440.

<sup>6</sup> *The Caroline*, 6 C. Rob. Adm. 461; *The Madison*, Edw. Adm. 224; *The Commercen*, 1 Wheat. 382. See 1 Duer, Mar. Ins 459.

826. "If," says Vattel, "I lay siege to a place, or only form a blockade, I have a right to hinder any one from entering, and to treat as an enemy any one who attempts to enter the place, or carry any thing to the besieged, without my leave."<sup>1</sup>

On principle it might well be questioned whether the right to confiscate vessels bound to a blockaded port can be applied to a place not completely invested by land as well as by sea. If we examine the reasoning on which is founded the right to intercept and confiscate supplies designed for a blockaded town, it will be difficult to resist the conviction, that its extension to towns invested by sea only is an unjustifiable encroachment on the rights of neutrals."<sup>2</sup>

According to the usage under the law of nations, a belligerent has a right to blockade a place and cut off all communication by sea, although it is not at the same time besieged. Notwithstanding the late practice of Great Britain and France, of declaring ports in a state of blockade, although not actually invested by an adequate naval force, it has always been held that, *to constitute a blockade, so as legally to intercept the intercourse of neutrals, a force must be present for the purpose of maintaining the blockade, sufficient to cut off all communication by sea, or to make an entry imminently dangerous.*<sup>3</sup>

Sir William Scott says: "A blockade is a sort of circumvallation, by which all correspondence and communication is, as far as human force can effect it, to be entirely cut off."<sup>4</sup> But if the blockading squadron is occasionally blown off, the commander retaining the purpose of returning to the station immediately, and using due diligence for this purpose, this does not suspend the blockade.<sup>5</sup>

827. A blockade is properly a uniform and general exclusion

<sup>1</sup> Vattel, lib. 3, c. 7, s. 117.

<sup>2</sup> Letter of Chief Justice Marshall, while Secretary of State, of September 20, 1800, to Mr. King, then American Minister at London, 3 Wheat. App. p. 4.

<sup>3</sup> The Betsey, 1 C. Rob. Adm. 93; Williams v. Smith, 2 Caines, N. Y. 14; Radcliff v. United Ins. Co. 7 Johns. N. Y. 38.; The Henrick and Maria, 1 C. Rob. Adm. 146; The Frederick

Molke, 1 id. 86; The Mercurius, id. 80; Journal of Congress, Vol. VII. p. 241, December 4, 1781; The Nancy, 1 Act. Prize Cas. 57; The Eagle, 1 id. 65.

<sup>4</sup> The Vrow Judith, 1 C. Rob. Adm. 150. See The Byfield, Edw. Adm. 188.

<sup>5</sup> Radcliff v. United Ins. Co. 7 Johns. N. Y. 38; The Frederick Molke, 1 C. Rob. Adm. 86; The Columbia, id. 154; The Juffrow Maria, 3 id. 147.

of vessels ; *if, therefore, some vessels are permitted to pass, others have a right to infer that the blockade is raised.* Such a mode of keeping up a blockade destroys its effect. Accordingly, as there is no valid blockade, there can be no breach of blockade.<sup>1</sup>

828. *A declaration of blockade is a high act of sovereignty, and it is usually made directly by the government to which the blockading squadron belongs. A blockade is, however, in some cases declared by an officer of a belligerent power, and when so declared, it will affect the subjects of neutral nations as far as it is authorized, or adopted and ratified, by his government.* The implied authority in this respect vested in a naval commander, is much greater at a distance from his government than when he is near it. To affect neutral nations, it must be laid by competent authority,<sup>2</sup> and they are affected only in the extent to which it is so laid. If any marine channel is left free, there is no blockade in respect to such channel.<sup>3</sup>

829. *Neutral nations are not affected by a blockade until they have notice of it.* This notice may be publicly given by the belligerent to the neutral government, when it will in general be presumed to be given to the subjects of the neutral government ; or it may be given directly to the captain or owners of a vessel. It must appear, either that the neutral subject has had notice of the blockade, or that it was so publicly and generally known, that he must be presumed to have a knowledge of it.<sup>4</sup> Those persons who are in the port blockaded are always presumed to have notice of the blockade.<sup>5</sup>

A blockade is *primâ facie* presumed to continue till notification of its being raised.<sup>6</sup>

If a blockading squadron is driven off by a superior force, a new notification will be requisite, if the blockade is resumed.<sup>7</sup>

<sup>1</sup> The Rolla, 6 C. Rob. Adm. 364.

<sup>2</sup> The Henrick and Maria, 1 C. Rob. Adm. 146 ; The Rolla, 6 id. 364.

<sup>3</sup> The Ocean, 3 C. Rob. Adm. 297 ; The Stert, 4 id. 65 ; The Jonge Pieter, id. 79.

<sup>4</sup> The Henrick and Maria, 1 C. Rob. Adm. 146 ; Radeliff v. United Ins. Co.

<sup>7</sup> Johns. N. Y. 38 ; 9 id. 277 ; The Neptunus, 2 C. Rob. Adm. 110 ; The

Adelaide, 2 id. 111, n. ; The Calypso, 2 id. 298 ; The Mercurius, 1 id. 80 ; The Rolla, 6 id. 364 ; The Tutela, id. 177.

<sup>5</sup> The Vrow Judith, 1 C. Rob. Adm. 150.

<sup>6</sup> The Neptunus, 1 C. Rob. Adm. 170.

<sup>7</sup> The Hoffnung, 6 C. Rob. Adm. 112 ; The Tripeten, id. 65.

Notice from a fleet of the blockading government, that the blockade is raised, though erroneous, cancels the prior notice of the blockade, and justifies proceeding for the port.<sup>1</sup>

830. *If the assured has actual or constructive notice of a blockade declared upon sufficient authority, and maintained by an adequate force, an attempt on his part to carry property warranted neutral to or from the blockaded port, is a violation of the blockade and a breach of the warranty.*<sup>2</sup> A neutral vessel that had entered the port before the blockade, may come out in ballast,<sup>3</sup> or with a cargo taken on board before the blockade began,<sup>4</sup> but not with one taken on board after notice of the blockade.<sup>5</sup>

So a ship may bring away from a blockaded port the cargo imported in her before the declaration of blockade, and still remaining on board. A vessel purchased at the blockaded port after the declaration of blockade, cannot be cleared out from the port while the blockade continues.<sup>6</sup>

Leaving such port is justifiable in case of war impending between the country to which it belongs and that of the vessel and owners of the cargo.<sup>7</sup>

831. Sir William Scott says, "If a vessel sail for a blockaded port, after having received notification of the blockade, the act of sailing is to be considered as a breach of the blockade."<sup>8</sup> But Chief Justice Marshall, giving the opinion of the court,<sup>9</sup> intimates,

<sup>1</sup> The *Neptunus*, 2 C. Rob. Adm. 110. Article 18 of the treaty of 1794, between the United States and Great Britain, recognizes the doctrine in the text, by providing that "a vessel sailing for a port, not knowing the same to be blockaded, may be turned away, but shall not be detained unless, after notice, she shall again attempt to enter." The *Columbia*, 1 C. Rob. Adm. 154.

<sup>2</sup> *Bynkershoeck*, Q. J. P. l. 1, c. 4 & 11; The *Welvaart Van Pillaw*, 2 C. Rob. Adm. 128; Resolution of the States General of Holland, 1630, 3 C. Rob. Adm. 326, n.; The *Exchange*, Edw. Adm. 39; The *Gute Erwartung*, 6 C. Rob. Adm. 182; The *Hare*, 1 Act. Prize Cas. 252; The *Manchester*, 2 id. 60; The *Maria*, 5 C. Rob. Adm. 365.

<sup>3</sup> The *Frederick Molke*, 1 C. Rob. Adm. 86.

<sup>4</sup> *Oldden v. M'Chesney*, 5 Serg. & R. Penn. 71; *Olivera v. Union Ins. Co.*, 3 Wheat. 183; The *Vrow Judith*, 1 C. Rob. Adm. 150; The *Juno*, 2 id. 116; The *Potsdam*, 4 id. 89.

<sup>5</sup> The *Neptunus*, 1 C. Rob. Adm. 170; The *Rolla*, 6 id. 364; The *Comet*, Edw. Adm. 32.

<sup>6</sup> The *General Hamilton*, 6 C. Rob. Adm. 61; The *Vigilantia*, id. 122.

<sup>7</sup> The *Dree Vrienden*, 1 Dods. Adm. 269.

<sup>8</sup> The *Vrow Johanna*, 2 C. Rob. Adm. 109.

<sup>9</sup> 4 Cranch, 199; and see *Maryland Ins. Co. v. Wood*, 6 id. 29.



that *the act of sailing for the blockaded port, knowing it to be such, must be coupled with the intention of entering it, in order to constitute a violation of the blockade*; for a vessel might sail from the United States for a blockaded port in Europe, after notice of the blockade, with the expectation of its being raised before her arrival, and with the intention of sailing for another port if the blockade should not be raised. So it was held by Mr. Justice Washington.<sup>1</sup> Sir William Scott has given a similar opinion.<sup>2</sup>

832. *To constitute a violation of blockade, it is requisite, not only that the party should have such intention, but also that he should do some act in pursuance of it.*<sup>3</sup>

“The law of nations does not admit of the condemnation of a neutral vessel for the intention to enter a blockaded port, unconnected with any fact. Linger about the place, as if watching for an opportunity to sail into it, or the single circumstance of not making immediately for some other port, or possibly obstinate and determined declaration of a resolution to break the blockade, might be evidence of an attempt, after warning, to enter a blockaded port.”<sup>4</sup>

833. *Sailing for a blockaded port with intent to violate the blockade is an attempt to violate it, and an incipient violation of it, and is treated as a consummated one, if the blockade exists, and there is a possibility of violating it at the time of the capture of the vessel for such violation, while pursuing her voyage with such intent.*<sup>5</sup>

834. *Notice of a blockade, and an intention of the master to violate it, and his acts thereupon, are immaterial, if there is not, at the time of his entering or of his capture, any then subsisting blockade, though there may have previously been one irregularly maintained, and then intended to be resumed;*<sup>6</sup> or one not extending to the place of entry.<sup>7</sup>

835. *So, if the intent to violate a blockade has been renounced,*

<sup>1</sup> Sperry v. Delaware Ins. Co. 2 Cranch, 185; and see cases supra and Wash. C. C. 243. infra.

<sup>2</sup> The Betsey, 1 C. Rob. Adm. 332; <sup>5</sup> See cases supra and infra.

The Shepherdess, 5 id. 262. <sup>6</sup> Williams v. Smith, 2 Caines, N. Y. 13; Radcliff v. United Ins. Co. 7 Johns. N. Y. 38.

<sup>3</sup> Calhoun v. Ins. Co. of Pennsylvania, 1 Binn. Penn. 293. <sup>7</sup> The Henrick and Maria, 1 C. Rob. Adm. 146.

<sup>4</sup> Fitzsimmons v. Newport Ins. Co. 4

and the ship is no longer pursuing the course to the blockaded port at the time of her being captured, *there ceases to be any violation of the blockade*, and the fact of the previous incipient violation is cancelled.<sup>1</sup>

836. *In case of there being evidence on board of the ship, that the owner of the whole or a part of the cargo did not intend to violate a blockade, his goods will not be condemned*, though the ship and other goods, if any, may be so.<sup>2</sup>

837. *It is a violation of blockade to sail with intent to proceed to the mouth of the harbor, for the purpose of inquiring whether the blockade is raised.*<sup>3</sup>

The court intimates, that sailing from the United States for a European port, known to be blockaded, with similar instructions, would be a breach of the blockade.<sup>4</sup>

838. *An agreement by a charter-party to sail to a port, which is afterwards blockaded, does not justify the captain's proceeding on the voyage, after notification of the blockade.*<sup>5</sup> And Sir William Scott held it to be a breach of blockade in a captain not to change his course for a different port, after being warned that the port of destination was blockaded.<sup>6</sup> But it appears, from the decisions of the same judge cited above, that the construction to be put upon this act of the captain ought to depend on his distance from the port of destination when he receives the notification, and other circumstances showing whether he continues on his course with the purpose of violating the blockade, or with the expectation of its being raised, and the intention of waiting at some other port for that event.

839. *It is a violation of blockade to sail for the blockaded port with instructions and intent to proceed and enter, if the winds should be such as to blow off the blockading squadron.*<sup>7</sup>

<sup>1</sup> The *James Cook*, Edw. Adm. 261; The *Trende Sostre*, 6 C. Rob. Adm. 390, n; The *Licette*, 6 id. 387; The *Imina*, 3 id. 167.

<sup>2</sup> The *Mercurius*, 1 C. Rob. Adm. 80; The *Exchange*, Edw. Adm. 39; The *Neptunus*, 3 C. Rob. Adm. 173; The *Adelaide*, id. 281; The *Manchester*, 2 Act. Prize Cas. 60; The *James Cook*, Edw. Adm. 261.

<sup>3</sup> The *Juno*, 2 C. Rob. Adm. 116;

The *Hoffnung*, id. 162; and see *Maryland Ins. Co. v. Woods*, 6 Cranch, 29.

<sup>4</sup> The *Spes* and The *Irene*, 5 C. Rob. Adm. 76; The *Posten*, 1 id. 335.

<sup>5</sup> The *Tutela*, 6 C. Rob. Adm. 177.

<sup>6</sup> The *Adonis*, 5 C. Rob. Adm. 256; The *Shepherdess*, id. 262; The *Apollo*, id. 286.

<sup>7</sup> The *Columbia*, 1 C. Rob. Adm. 154.

840. *Where the vessel sails for a distant port, known to be blockaded, but with a prior destination to another port at a proper distance from the blockaded one, to learn whether the blockade has ceased, and with a bonâ fide expectation that it may have ceased, and another destination in such case, is not a violation of the blockade.*<sup>1</sup>

Sir William Scott said: "The design was to seize the opportunity of entering whilst the winds kept the blockading squadron at a distance. Under these circumstances, I have no hesitation in saying that the blockade was broken." He accordingly condemned the vessel and cargo; and his judgment was confirmed on appeal.

An action was tried in the Supreme Court of New York, upon a policy by which the cargo of the *Columbia* was insured and warranted American. Justices Radcliff, Kent, and Benson concurred in the opinion of Sir William Scott, and thought the warranty had not been complied with, and the judgment was in conformity with their opinion. Chief Justice Lansing dissented, upon the ground that, by the treaty with Great Britain, the master was authorized knowingly to make one attempt to enter.<sup>2</sup> The Court of Appeals reversed the judgment, upon the ground that the intention of the master was to inquire whether the blockade was raised.<sup>3</sup> The decision of Sir William Scott and of the Supreme Court of New York seems to have been plainly right, according to the construction which they put upon the evidence, as proving an intention, on the part of the master to violate the blockade. So the decision in the Court of Appeals was right, upon its construction of the evidence, as not proving such an intention. The discrepancy is in the construction of the testimony, and that of Sir William Scott and the Supreme Court of New York certainly seems to be the obvious one.<sup>4</sup>

<sup>1</sup> *Naylor v. Taylor*, 9 Barnew. & C. 718; *The Shepherness*, 5 C. Rob. Adm. 262; *Winder v. Wise*, 1 Dowl. & L. 240.

<sup>2</sup> *Vos v. United Ins. Co.* 2 Johns. Cas. N. Y. 180. The Supreme Court of the United States put a different construction upon the treaty, agree-

ing with that of Sir William Scott, 4 Cranch, 200.

<sup>3</sup> 1 Caines Cas. N. Y. vii.; 2 Johns. Cas. N. Y. 460. See also *Liotard v. Graves*, 3 Caines, N. Y. 226.

<sup>4</sup> See, on this subject, 1 Duer, Ins. 691, and note to the case of *Olivera v. Union Ins. Co.* 3 Wheat. 183, which is

841. *Lingering near a blockaded port*, as well as continuing on the course towards it, after notification, where it shows an intention to enter the port, is a breach of the blockade.<sup>1</sup>

842. *It is not a violation of blockade to enter or depart from a port with the permission of the officers of the blockading squadron*, and the vessel so entering may clear out with a cargo.<sup>2</sup> But where such permission was given by a belligerent cruiser to a neutral to enter an interdicted port, through an erroneous construction of the interdiction, the entry was held not to be justified.<sup>3</sup>

843. *It is not a breach of blockade to enter the blockaded port from necessity in distress*, when no other port can be made.<sup>4</sup> So a ship may visit a blockaded port by the license of the government to which the blockading squadron belongs, and such license is construed liberally in favor of the neutral.

844. *Nor is it a violation of blockade by a neutral to purchase goods at the blockaded seaport, and transport them inland to another port not blockaded, and export them thence;*<sup>5</sup> or to transport goods by inland navigation to the blockaded seaport.<sup>6</sup>

845. Where loss ensues by reason of neglect in claiming the property insured with warranty of neutrality, on the same being captured, the liability of underwriters is determined as in other cases of question as to negligence, misconduct, or mistake of the assured or his agents.<sup>7</sup>

cited and ably commented upon by Mr. Duer.

<sup>1</sup> The *Elizabeth*, Edw. Adm. 198; The *Arthur*, id. 202; The *Little William*, Act. Prize Cas. 141; The *Irene*, 5 C. Rob. Adm. 76; The *Neutralitet*, 6 id. 30.

<sup>2</sup> The *Juffrow Maria*, 3 C. Rob. Adm. 147; The *Henricus*, id. 159, n; The *Vrouw Barbara*, id. 158, n; *Old-dan v. M'Chesney*, 5 Serg. & R. Penn. 71.

<sup>3</sup> The *Courier*, Edw. Adm. 249.

<sup>4</sup> The *Fortuna*, 5 C. Rob. Adm. 27; The *Charlotte*, Edw. Adm. 352; The *Hurtige Hane*, 2 C. Rob. Adm. 124.

<sup>5</sup> The *Ocean*, 3 C. Rob. Adm. 297.

<sup>6</sup> The *Stert*, 4 C. Rob. Adm. 65; The *Jonge Pieter*, id. 79.

<sup>7</sup> See c. 13, s. 2; also the remark of Benson, J., *Vandenheuevel v. United Ins. Co.* 2 Johns. Cas. N. Y. 127, 158; and of Yates, J., *Gardere v. Columbian Ins. Co.* 7 Johns. N. Y. 514.



## SECTION IX. PARTICULAR WARRANTIES AND CONDITIONS.

846. Insurance upon "*lawful goods*" is not unfrequent.

This warranty was held in New York to be satisfied, though the goods were contraband of war;<sup>1</sup> which construction, by confining the restriction to unlawful goods, renders it null, since such are so, as we have seen,<sup>2</sup> without this clause.

847. *A warranty that a vessel "shall have no contraband goods on board," means contraband of war; and not illicit trade at the port of destination, where it is well understood that the trade is illicit at such port.*<sup>3</sup>

848. *Warranty that the ship "was well" on a certain day is satisfied if she was so any time on that day.*<sup>4</sup>

849. *Under the provision contained in many forms of policy, called "the rotten clause," that "if the ship, on a regular survey, shall be declared unseaworthy by reason of being rotten or unsound," the insurers shall be discharged; in case it appears from the survey that the decayed state of the vessel is the reason for not repairing, they are discharged, though it may have sustained damage by the perils insured against. But if it is not irreparable by reason merely of rottenness, they are liable.*<sup>5</sup>

Though some of the decisions on this clause are somewhat indistinct, I understand them to result on the whole to the doctrine above stated, and which is the most obvious import of the stipulation; namely, that if the irreparableness and innavigability of the vessel are attributed by the survey to rottenness, independ-

<sup>1</sup> *Seaton v. Low*, 1 Johns. Cas. N. Y. 1; *Skidmore v. Desdoity*, 2 id. 77; *Richardson v. Maine Fire & Mar. Ins. Co.* 6 Mass. 102. In consequence of the first of these decisions, the clause already mentioned, *supra*, No. 42, excepting loss of contraband goods, was added to marine policies. 1 Johns. Cas. N. Y. 15, n.

<sup>2</sup> Chap. 3, s. 2.

<sup>3</sup> *Vandervoort v. Smith*, 2 Caines, N. Y. 155.

<sup>4</sup> *Blackhurst v. Cockell*, 3 Term, 360.

<sup>5</sup> *Haff v. Marine Ins. Co.* 8 Johns. N. Y. 163; *Griswold v. National Ins. Co.* 3 Cow. N. Y. 96; *Watson v. Ins. Co. of North America*, 2 Wash. C. C. 152, 480; *Armroyd v. Union Ins. Co.* 2 Binn. Penn. 394; *Marine Ins. Co. of Alexandria v. Wilson*, 3 Cranch, 187; *Door v. Pacific Ins. Co.* 7 Wheat. 581; *Brandegge v. National Ins. Co.* 20 Johns. N. Y. 328; *Janney v. Columbian Ins. Co.* 10 Wheat. 411; *Innes v. Alliance Mut. Ins. Co.* 1 Sandf. N. Y. 310.

ently of the damage by the perils insured against, the insurers are discharged from the loss ; but if to both causes, they are not discharged.

The import of the whole survey taken together is to be regarded, and not merely that of particular expressions.<sup>1</sup> If divers surveys are made, they are to be taken together.<sup>2</sup>

850. *The warranty against rottenness relates to the time when the survey is made.*

851. *The underwriters are discharged at whatever time the decay may have commenced, and whether the ship was or was not unseaworthy by reason of rottenness when the risk commenced.*<sup>3</sup>

852. In respect to *what constitutes a regular survey*, one made under the order of a court having jurisdiction of the proceeding is such, as far as the authority to order it is concerned :

So also one made by surveyors appointed by the American consul in a foreign port :<sup>4</sup>

So one by surveyors appointed under a law of a State, as long as there is no act of Congress on the subject :<sup>5</sup>

So also one by surveyors appointed by the master, where, under the circumstances, such an appointment is a sound exercise of discretion on his part :<sup>6</sup>

So the assent of the master to a survey is ground of presumption of its being regular.<sup>7</sup>

There may, however, doubtless be irregularities in a survey by surveyors duly appointed.

853. According to the decision of the Supreme Court of the United States, the *report of surveyors on a regular survey*, that a vessel is irreparable and innavigable by reason of decay, is *conclusive of the fact* under this stipulation.<sup>8</sup>

854. *It is not essential that the survey should be during the*

<sup>1</sup> Brandegee v. National Ins. Co. 20 Johns. N. Y. 328; Innes v. Alliance Mut. Ins. Co. 1 Sandf. N. Y. 310.

<sup>2</sup> Innes v. Alliance Mut. Ins. Co. 1 Sandf. N. Y. 310.

<sup>3</sup> Dorr v. Pacific Ins. Co. 7 Wheat. 581; Rogers v. Niagara Ins. Co. 2 Hall, N. Y. 86.

<sup>4</sup> Innes v. Alliance Mut. Ins. Co. 1 Sandf. N. Y. 310.

<sup>5</sup> Janney v. Columbian Ins. Co. 10 Wheat. 411.

<sup>6</sup> Polleys v. Ocean Ins. Co. 14 Me. 141.

<sup>7</sup> Janney v. Columbian Ins. Co. 10 Wheat. 411; Dorr v. Pacific Ins. Co. 7 Wheat. 581.

<sup>8</sup> Dorr v. Pacific Ins. Co. 7 Wheat. 581.

*voyage*; it is sufficient if it is made within a reasonable time after the termination of the voyage.<sup>1</sup>

855. *The stipulation to claim property not Spanish as being so, is legal.*<sup>2</sup>

856. *Under an agreement of the assured to prosecute a claim for the property till final condemnation in the High Court of Admiralty, or acquittal, the insurers to "contribute to the expenses" proportionably, he must commence the prosecution of his appeal from the decree of condemnation in the inferior tribunal, and is not justified in neglecting to do so by the refusal of the insurers to make advances for the expense.*<sup>3</sup>

857. *Under a stipulation that a policy on a ship and cargo shall be cancelled "should the vessel and cargo be insured in E.," the insurance will be cancelled on only one of the interests, if only one is insured in E.*<sup>4</sup>

858. *A stipulation in a respondentia bond, that, if the vessel shall end the voyage within six months, the casualties of the seas excepted, "having on board the stipulated amount on the respective passages outward and homeward," the bond shall become absolute, is held, by Mr. Justice Story, to be a stipulation for marine interest on the amount at risk on each passage, not that the whole amount shall be on board during each passage.*<sup>5</sup>

859. *A stipulation, that "orders shall be given not to cruise," is not satisfied with merely implications and grounds of inference to that effect in the instructions to the master; it requires explicit orders.*<sup>6</sup>

860. *A stipulation for "a passport in the usual form, from Admiral S." requires one for the whole voyage; but a majority of the court in Connecticut were of opinion, that one for "flour, and other dry provisions," was sufficient to cover a cargo of beef, pork, and candles, such a license being in the usual known form granted by the same officer.*<sup>7</sup>

<sup>1</sup> Griswold v. National Ins. Co. 3 Cow. N. Y. 98.

<sup>2</sup> Coolidge v. Blake, 15 Mass. 429.

<sup>3</sup> Thatcher v. Bellows, 13 Mass. 111.

<sup>4</sup> Davis v. Boardman, 12 Mass. 80.

<sup>5</sup> Franklin Ins. Co. v. Lord, 4 Mas. C. C. 248. See, to the same effect,

Emerigon on Maritime Loans, translated by Hall, p. 149.

<sup>6</sup> Ogden v. Ash, 1 Dall. Penn. 162.

<sup>7</sup> Bulkley v. Derby Fishing Co. 1 Conn. 571. The passport in this case was obtained through the intervention of a minister of a neutral nation, to a port of which the vessel was destined.

861. In some cases courts have appeared to construe an insurance upon goods "*from the lading thereof on board the vessel,*" at a certain place, to be a warranty or condition that the goods shall be loaded on board at the place named.

When speaking of this provision of the policy as having this character, and not as merely determining the commencement of the risk, courts seem to have considered the object of it to be to ascertain the state of the goods, so as to secure the underwriter from liability for previous losses.<sup>1</sup> But this clause has been considered in other cases as merely a part of the description of the subject and the risk.

862. Under a policy on a vessel from C. to the coast of Africa, and during her stay there and back, "*warranted not to remain on the coast for more than four months,*" the court was of opinion, that *the four months began after the vessel had arrived and been safely moored* twenty-four hours on the coast, and that she had been so moored twenty-four hours, *though she had before lost her best bower anchor, and was moored by the small bower*; and accordingly, that her being on the coast more than four months from such arrival was a forfeiture of the policy.<sup>2</sup>

863. Under a rule of a mutual insurance association, having the force of a stipulation, that, *unless the orders given for stores and repairs by the managing committee are complied with, "the ship shall not be insured," the policy is forfeited by non-compliance.*<sup>3</sup>

864. A provision in a policy, that, *if notice of other insurance by the assured on the same subject, is not given, the policy shall be void*, applies to other subsequent, as well as prior insurance; but if the subsequent other insurance is void by reason of not giving notice of the prior insurance, the latter will remain valid.<sup>4</sup>

Under the provision that the policy shall be void if the assured shall insure the same property, or, "any property connected with it, at any other office," a policy on a building is not made void by a subsequent insurance at another office on goods contained in it.<sup>5</sup>

<sup>1</sup> Spitta v. Woodman, 2 Taunt. 416;  
16 East, 188, n.; Nonnen v. Reid, 16  
East, 176.

<sup>2</sup> Marden v. South Carolina Ins. Co.  
1 Const. So. C. 200.

<sup>3</sup> Stewart v. Wilson, 12 Mees. & W.  
Exch. 11.

<sup>4</sup> Stacey v. Franklin Ins. Co. 2 Watts  
& S. Penn. 506.

<sup>5</sup> Jones v. Maine Mut. Fire Ins. Co.  
18 Me. 155.



A provision that the *vessel shall not engage in the cotton trade* without consent indorsed, excepts loss while engaged in such trade.<sup>1</sup>

A stipulation in a time policy that *the vessel shall not carry grain in bulk* is violated if, at the attaching of the policy, it is entering a foreign port with grain in bulk, though it is to be there discharged.<sup>2</sup>

A stipulation that *the policy shall be made void by alienation*, is not violated by seizure at the suit of an attaching creditor.<sup>3</sup>

A *by-law* of a mutual company that *the assured shall have no claim unless he shall previously deliver a written undertaking* from assignees and mortgagees, if there are any, to pay to the underwriters all sums which may become due on account of the vessel, is a condition precedent to the right of action.<sup>4</sup>

A provision against alienation is held not to cover the case of a conveyance and simultaneous reconveyance in mortgage.<sup>5</sup>

865. A stipulation for submitting disputes which may arise in future on a contract, to arbitrators, has heretofore been held not to be binding to the effect of defeating the right of action upon it without any previous offer of arbitration.<sup>6</sup>

It is clear that a stipulation which goes to the extent of ousting the jurisdiction of a court cannot be enforced,<sup>7</sup> and courts of equity will refuse to decree specific performance of the agreement in such cases.<sup>8</sup>

<sup>1</sup> Gaty v. Phoenix Ins. Co. 30 Mo. 56.

<sup>2</sup> Sawyer v. Coasters', &c. Ins. Co. 6 Gray, Mass. 221.

<sup>3</sup> Marigny v. Home, &c. Ins. Co. 13 La. Ann. 338.

<sup>4</sup> Hughes v. Tindall, 18 C. B. 98; 36 Eng. L. & Eq. 413.

<sup>5</sup> Hitchcock v. North Western Ins. Co. 26 N. Y. 68; and see *infra*, No. 880.

<sup>6</sup> *Supra*, No. 58, n.

<sup>7</sup> Kill v. Hollister, 1 Wils. 129; Thompson v. Charnock, 8 Term, 139; Goldstone v. Osborn, 2 Carr. & P. 550; Mitchell v. Harris, 2 Ves. 129; Wellington v. Mackintosh, 2 Atk. Ch. 569; Nichols v. Chalie, 14 Ves. 265; Robinson

v. Georges Ins. Co. 6 Harr. & J. Md. 408; Gray v. Wilson, 4 Watts, Penn. 39; Contee v. Dawson, 2 Bland, Md. Ch. 264; Randel v. Chesapeake & Del. Canal Co. 1 Harr. Del. 233; Horton v. Stanley, 1 Miles, Penn. 418; Stone v. Dennis, 12 Ala. 231; Haggart v. Morgan, 4 Sandf. N. Y. 198; 1 Seld. 422; Harris v. Reynolds, 7 Q. B. 71.

<sup>8</sup> Wellington v. Mackintosh, 2 Atk. Ch. 569; Street v. Rigby, 6 Ves. 815; Milnes v. Gery, 14 id. 400; Blundell v. Brettargh, 17 id. 232; Gourlay v. Duke of Somerset, 19 id. 429; Wilks v. Davis, 3 Mer. 507; Agar v. Macklew, 2 Sim. & S. 418; Mexborough v. Bower, 7 Beav. 127; Copper v. Wells,

A judgment in a leading English case abandons the ground on which the jurisprudence on this subject had been put. It was provided by a policy of a mutual insurance company that "the sum to be paid to any suffering member should, in the first instance, be ascertained and settled by the committee, and if a difference should arise between the committee and the suffering member relative to the settling of any loss, arbitrators should be appointed "in the manner specified," who should decide "upon the claims and matters in dispute," and that "no member who should refuse to accept the amount settled by the committee in full satisfaction should be entitled to maintain any action at law or suit in equity on his policy, until the matters in dispute should have been referred to and decided by the arbitrators, and then only for such sum as said arbitrators should award; and the obtaining the decision of such arbitrators was declared to be a condition precedent to the right of any member to maintain any such action or suit."

A dispute arose with the committee, and the matter was not referred to arbitrators. It was held by all the Justices of the Court of Exchequer Chamber, that the assured could not bring an action for a loss until the amount had been settled by the committee, and "if he was not satisfied with their decision until there had been an award by arbitrators."<sup>1</sup>

The judgment in the Exchequer Chamber was affirmed in the House of Lords; it was held that, while an agreement to oust the jurisdiction of the court was clearly void, the parties might agree that no right of action should accrue until after a reference had been made to an arbitrator.<sup>2</sup>

The dissenting opinions,<sup>3</sup> admitted this general principle but construed the agreement as in fact ousting the jurisdiction of the court, and leaving to the court merely the power of enforcing the award of the arbitrators. The majority held that it did not go to this extent, but that the suit would still be brought on the

Saxt. N. J. 10; *Tobey v. County of Bristol*, 3 Stor. C. C. 800.

<sup>1</sup> *Avery v. Scott*, 8 Exch. 497, 20 Eng. L. & Eq. 334; reversing the decision of the Court of Exchequer; *Scott v. Avery*, 8 Exch. 487; 20 Eng. L. & Eq. 327.

<sup>2</sup> *Scott v. Avery*, 5 Hou. L. Cas. 811; 36 Eng. L. & Eq. 1. See also *Tredwen v. Holman*, 1 Hurlst. & C. Exch. 72.

<sup>3</sup> Per Martin, B., Crompton, J., Alderson, B.

policy. It seems, therefore, to be mainly a question of construction. It is not distinctly stated whether the liability of the company is definitively limited to the amount awarded by the arbitrators.

The Court of Queen's Bench have confirmed the validity of a stipulation for arbitration, though its decisions are based to some extent on statutes not applicable in the United States.<sup>1</sup>

The Supreme Court of Massachusetts hold that the arbitration clause cannot be set up by the underwriters after they have taken possession of a ship to repair, as this act amounts to a waiver. While inclining to doubt the validity of such a clause, they say that the English cases may lead to some qualification of the doctrine as heretofore understood.<sup>2</sup>

The anomaly of sanctioning agreements made prospectively for substituting other tribunals for those established by law, might be avoided by permitting either party to demand, before some legal tribunal, a specific execution of this agreement for an arbitration, under its order, and subject to its superintendence, in the same manner as cases are referred to masters in chancery; or as references to arbitrators are made under a rule of court. Such a law would specify the causes of civil actions in respect to which such prospective agreements for arbitration would be valid, limiting the operation of the law to contracts or otherwise, for such an agreement would hardly be made binding in respect to misfeasances.

#### SECTION X. WARRANTIES, CONDITIONS, AND STIPULATIONS IN FIRE POLICIES.

866. *A condition expressed as such in a fire policy, if not complied with, defeats the insurance no less than in a marine one, whether it is material to the risk or not, and whether the non-compliance be with or without the act or privity of the assured.*<sup>3</sup>

<sup>1</sup> *Livingston v. Ralli*, 8 Ell. & B. 132; 30 Eng. L. & Eq. 279; *Russell v. Pellegrini*, 6 Ell. & B. 1020; 38 Eng. L. & Eq. 99.

<sup>2</sup> *Cobb v. New England Ins. Co.* 6 Gray, Mass. 192.

<sup>3</sup> *Duncan v. Sun Fire Ins. Co.* 6 Wend. N. Y. 488; *Jefferson Ins. Co. v. Cotheal*, 7 id. 72; *Fowler v. Ætna Ins. Co.* id. 270; *Merriam v. Middlesex Ins. Co.* 21 Pick. Mass. 162; *Holmes v. Charlestown Mut. Fire Ins. Co.*

It has been remarked that the "strictness and nicety," as to warranties, adopted in the trial of questions on policies of marine insurance, are not, to their full extent, applicable to policies "made by a mutual fire insurance company, in which the insurers assume the risk on the knowledge acquired by an actual survey and examination made by themselves, and not on the representations made by the assured."<sup>1</sup> But it seems to be very questionable whether there is any such distinction in the construction of warranties in different descriptions of policies. It certainly has not been marked and defined in the cases.

A statement of a fact, whether in description or otherwise, is considered to be a warranty in a fire policy no less than a marine one, where the fact is one upon which the parties can be presumed to have proceeded as being essential in making the contract. But clauses and statements intended and serving merely as a description to identify the subject of a policy, and having no relation to the risk or rate of premium, are construed in fire, as in marine insurance, not to constitute conditions on which the validity of the contract depends.<sup>2</sup>

866 a. *In respect to what constitutes a warranty, and in respect to the rules of construction, there does not appear to be any distinction between marine and fire insurance.*<sup>3</sup>

Thus, besides stipulations in the body of the policy, the written answers of the applicant, to inquiries put to him on the part of the underwriters, indorsements, the charter of the insurance company, surveys made by third parties and presented by the assured, and other documents expressly referred to in the policy as being a part of it or being warranties, will all be express warranties, representations, or mere descriptions serving to identify the subject or the risks, according to the same rules and distinctions as in marine insurance.<sup>4</sup>

10 Metc. Mass. 211; *Battaille v. Merchants' Ins. Co. of New Orleans*, 3 Rob. La. 381; *Egan v. Mut. Ins. Co. of Albany*, 5 Den. N. Y. 326; *Bilbrough v. Metropolis Ins. Co.* 5 Duer, N. Y. 587; *Pennsylvania Ins. Co. v. Gottsman's Adm'rs*, 48 Penn. St. 151; *Lycoming Ins. Co. v. Mitchell*, id. 307.

<sup>2</sup> *Supra*, No. 758, 769.

<sup>3</sup> As to construction of, and compliance with, representations and warranties, see *supra*, No. 70, 71, 72, 485 et seq., 527, 553, 569, 575, 608, 640, 651, 652, 669, 670, 673, 674, 762; and *infra*, 871, 872, 892.

<sup>4</sup> See *ut supra*.

<sup>1</sup> Per Dorsey, J., giving the opinion of the court.



But warranties, in many cases, as well as representations,<sup>1</sup> either directly or by implication, have reference to the future, and are promissory and continuing in their character. It has been objected, that holding an oral promissory representation to be obligatory, is making it equivalent to a stipulation in the policy. This is not so, excepting in cases where a substantial is equivalent to a strict compliance. The objection, however, if it were admitted to be valid in respect to a representation, has no application to express stipulations, of which class are warranties, since such stipulations most frequently have reference to the future. This is especially true in fire insurance, since it would be absurd to construe the written statements of the assured respecting the use made of a building, the precautions taken against fire, and others similar, that they only stipulate for what is done at the time of effecting the policy and has been done before. In such cases, the nature of the subject inquired about and the motive of the inquiry, must determine the construction of the answer as being a continuing warranty or not, and the degree of strictness requisite to a compliance with it.<sup>2</sup>

A statement in respect to insurance against fire, as in other insurance, includes whatever is evidently implied by it; as where, to the inquiry what buildings there were within ten rods of that proposed for insurance, the applicant replied, "surrounded by space on all sides," this was held to make it a condition that there were no buildings within the specified distance.<sup>3</sup>

The answer to the inquiry respecting the occupancy of a building, being that it was occupied as a "tavern-house," was held by the Court of Appeals of New York, not to be falsified by temporarily keeping a fire on the premises to try out grease.<sup>4</sup>

867. In respect to express warranties in fire policies, as well as marine, *the acts of agents and servants are imputed to the assured.*<sup>5</sup>

868. *Where a part of the insured subject, and a proportional interest in the policy, are duly assigned, within the rules of the*

<sup>1</sup> See *supra*, No. 553.

<sup>4</sup> *Gates v. Madison County Mut. Ins.*

<sup>2</sup> *Pim v. Reid*, 6 Mann. & G. 1, cited *infra*, No. 874.

Co. 5 N. Y. 469.

<sup>5</sup> *Duncan v. Sun Fire Ins. Co.* 6

<sup>3</sup> *Jennings v. Chenango County Mut. Ins. Co.* 2 Den. N. Y. 75.

Wend. N. Y. 488; and see *infra*, No. 1878, 1879, 1880.

company, the original assured becomes a third party in respect to such part, and *cannot*, unless he is agent of the assignee, *defeat the contract*, any more than any third party could do.

Accordingly, where the underwriters had assented to an assignment of a policy to a mortgagee of the insured premises, whose mortgage was for less than the amount insured, the Court of Appeals of New York held, that a subsequent act of forfeiture by the original assured, affected only the excess over the mortgage, the policy still remaining valid, and an action being sustained upon it in the names of the original assured for the benefit of the mortgagee, to the amount of his mortgage.<sup>1</sup>

That is to say, the effect of a valid assignment of a part of the amount insured by a policy, is the same *pro tanto* as an assignment of the whole policy in respect to the whole amount insured.<sup>2</sup>

869. *In a fire policy, no less than a marine one, compliance with an absolute allegation of a fact, or an absolute promise in the policy in reference to the risk, is a condition on which the liability of the insurers, from the time to which the allegation or promise relates, will depend.*

870. *Where an express warranty in fire, no less than in marine insurance, has reference to the commencement of the risk, as it more frequently has, and provides that the contract shall be void in case of non-compliance, the contract is forfeited by non-compliance, though temporary:*<sup>3</sup>

As in case of a mill "warranted conformable to the first class," but not so at the time for the risk to commence, though afterwards made so.<sup>4</sup>

The rule of rigid construction may favor the assured. In a policy on a paper-mill and its contents, with a condition requiring the application to state the "place where the property is situated, of what materials it is composed, its dimensions, how constructed, and for what occupied; its position relative to other buildings,

<sup>1</sup> Tillou v. Kingston Mut. Ins. Co. 5 N. Y. 405; 7 Barb. N. Y. 570. The Supreme Court of New York, in this case doubted Carpenter v. Washington Ins. Co. (of Providence), 16 Pet. 495. See as to distinct assureds in the same policy, *supra*, No. 93, 108, 395, 396, 398.

<sup>2</sup> See, No. 81, 410, 880.

<sup>3</sup> Stout v. City Ins. Co. 12 Iowa, 371. Vide *supra*, No. 764.

<sup>4</sup> Newcastle Fire Ins. Co. v. MacMorran, 3 Dow, Parl. Cas. 255.

and distance from each, if less than ten rods; whether it is encumbered, and, if the applicant has a less estate than a fee, the nature of his estate," — the clause relative to the distance of other buildings was held, in the Supreme Court of New York, to have reference to the insurance on the mill, and not to that on its contents.<sup>1</sup>

871. Written *answers* by the assured to the written *interrogatories* put by the underwriters, and *referred to in the policy*, are *part of the written contract*, to the effect to which, and for the purpose for which, *they are so referred to*, whether as warranties, representations, or mere descriptions of the subject.<sup>2</sup>

872. *Stipulations, though having the character of warranties and conditions, are to be reasonably construed*, in reference to the subject-matter, and not captiously or merely literally.<sup>3</sup>

The answers are not unfrequently referred to in the policy by the term "representations," but whether so referred to or not, if a literal compliance does not correspond to the object of the inquiry, a substantial compliance is requisite.<sup>4</sup>

A policy on a granary "and a kiln for drying corn attached," stipulated that the trades carried on in the premises were accurately described, and if a kiln or any other process of fire-heat were used and not noticed in the policy, the contract was to be void. A cargo of bark having been sunk near the premises, the assured allowed the bark to be dried at his kiln, and in consequence the granary was burnt down. The use of the kiln for this purpose was more hazardous than the use of it for drying corn, but it was held, notwithstanding, that the assured had a right to recover for the loss, as the description of the kiln in the

<sup>1</sup> *Trench v. Chenango County Mut. Fire Ins. Co.* 7 Hill, N. Y. 122. See also *Pim v. Reid*, 6 Mann. & G. 1.

<sup>2</sup> *Houghton v. Manufacturers' Mut. Fire Ins. Co.* 8 Metc. Mass. 114; *Snyder v. Farmers' Ins. & Loan Co.* 13 Wend. N. Y. 92; 16 id. 481; *Delonguemere v. Traders' Ins. Co.* 2 Hall, N. Y. 589; *Liscom v. Boston Mut. Ins. Co.* 9 Metc. Mass. 205; *Wall v. Howard Ins. Co.* 14 Barb. N. Y. 383; *Lochner v. Home Ins. Co.* 17 Mo. 247;

*Hartford Ins. Co. v. Harmer*, 2 Ohio St. 452; *Boardman v. New Hampshire Ins. Co.* 20 N. H. 551; *Abbott v. Shawmut Ins. Co.* 3 All. Mass. 213. See also *Barre Boot Co. v. Milford Ins. Co.* 7 id. 42. See *supra*, No. 553, 569, 592, 640, 641.

<sup>3</sup> See *supra*, No. 758, 769, 866.

<sup>4</sup> *Houghton v. Manufacturers' Mut. Fire Ins. Co.* 8 Metc. Mass. 114; *Lee v. Howard Ins. Co.* 11 Cush. Mass. 324.

policy was not considered to be a warranty that it was not to be used for any other purpose, and that such a use of it in a single instance was not a forfeiture of the policy.

The same policy provided, that, "if the risk to which the premises were exposed were by any means increased, notice was to be given to the office, and allowed by indorsement on the policy, or otherwise the insurance to be void." The use of the kiln for drying bark, as already stated, was ruled not to be such an increase of the risk as to require the stipulated notice and indorsement.<sup>1</sup>

Under the condition not to enhance the risk, the age of the building may be taken into consideration.<sup>2</sup>

Under a policy on the machinery of a cotton-mill, a condition that the mill is "worked by day only," is not falsified by a steam-engine belonging to the mill and gearing connected with it being kept in motion by night, the mill not being worked.<sup>3</sup>

A statement that an insured factory-building has iron doors, does not require that those opening towards adjoining buildings should be kept shut during working hours.<sup>4</sup>

A representation incorporated into the policy by reference, that the mills are examined thirty minutes after stopping work, applies equally where the work is continued beyond the usual time.<sup>5</sup>

An application by a tenant of a building during one year, for insurance on "his building," was held in New York to be a good description.<sup>6</sup>

Describing a building to be occupied by H. as a dwelling-house, is not a warranty of the continuance of his occupancy.<sup>7</sup>

A representation incorporated with the policy by reference,

<sup>1</sup> *Shaw v. Robberds*, 6 Ad. & E. 75; 1 Nev. & P. 279.

<sup>2</sup> *State Ins. Co. v. Arthur*, 30 Penn. St. 315.

<sup>3</sup> *Mayall v. Mitford*, 6 Ad. & E. 670; 1 Nev. & P. 732; and see *Whitehead v. Price*, 2 Crompt. M. & R. Exch. 447. Description of a mill as "constantly worked" is complied with if part of the operations are carried on at night. *Prieger v. Exchange Ins. Co.* 6 Wisc. 89.

<sup>4</sup> *Scott v. Quebec F. Ins. Co.* Stew. Adm. Low. C. 147.

<sup>5</sup> *Houghton v. Manufacturers' Mut. F. Ins. Co.* 8 Metc. Mass. 114.

<sup>6</sup> *Niblo v. North American F. Ins. Co.* 1 Sandf. N. Y. 551. See also *Herrick v. Union Ins. Co.* 48 Me. 558.

<sup>7</sup> *O'Neil v. Buffalo Ins. Co.* 3 N. Y. 123; *Joyce v. Maine Ins. Co.* 45 Me. 168.



that the assured is going to put up a stove for burning hard coal, is not a warranty to burn no other fuel in the stove.<sup>1</sup>

*A stipulation to remove a building* adjoining that insured, allows a reasonable time;<sup>2</sup> *that water tanks* in an unfinished building *shall be well supplied* with water, is complied with by building the tanks as the building progresses;<sup>3</sup> *for a force pump* means one in good working order, with power, but not any particular kind of power,<sup>4</sup> though it may be temporarily disconnected during alterations;<sup>5</sup> *that a stove is well secured*, means while in use;<sup>6</sup> *to keep a watchman* exclusively for the insured building is not broken by an agreement of the watchman, without the knowledge of the assured, to overlook an adjoining building;<sup>7</sup> *for occupancy of a workshop*, means an actual use for the purposes<sup>8</sup> of the assured.

Describing a building as "*occupied as stores*," is not a stipulation that *all* the rooms will be so occupied.<sup>9</sup>

872 a. *The inquiry respecting the relative situation* of the building proposed, or one in which goods are proposed, for insurance, *in respect to other buildings and distance therefrom* within specified limits, *must be truly and fully answered*.

The phraseology of a fire policy is usually such as to make it a condition that this inquiry is correctly and fully answered.

It may be such as to limit the condition to insurance upon a building in distinction from an insurance on its contents. The applicant for insurance on a building and its contents, being asked "where the property proposed for insurance was situated, of what materials, dimensions; the chimneys, fireplaces, stoves, how constructed; relative situation as to other buildings within ten rods, and how occupied;" the answer to these inquiries was held, by the Supreme Court of New York, to relate wholly to the

<sup>1</sup> Tillou v. Kingston Mut. Ins. Co. 7 Barb. N. Y. 570.

<sup>2</sup> Lindsey v. Union Ins. Co. 3 R. I. 157.

<sup>3</sup> Gloucester Manuf'g Co. v. Howard Ins. Co. 5 Gray, Mass. 497.

<sup>4</sup> Sayles v. North Western Ins. Co. 2 Curt. C. C. 610.

<sup>5</sup> Townsend v. North Western Ins. Co. 18 N. Y. 168.

<sup>6</sup> Loud v. Citizens' Ins. Co. 2 Gray, Mass. 221.

<sup>7</sup> Hovey v. American Ins. Co. 2 Du. N. Y. 554.

<sup>8</sup> Keith v. Quincy Ins. Co. 10 All. Mass. 228.

<sup>9</sup> Carter v. Humboldt Ins. Co. 17 Iowa, 456.

insurance on the building, on the ground that all the questions apparently related to the same subject, and some of them could not be understood to refer to its contents. The insurance on the building was accordingly held to be forfeited, and that on the contents by the same policy to be valid.<sup>1</sup>

In other cases, where the demand is for a statement of all the buildings within a specified distance, the validity of the policy has been held to depend upon all buildings within that distance being mentioned in the answer,<sup>2</sup> notwithstanding a case<sup>3</sup> which has a different aspect, and gives countenance to the doctrine, that a policy is not forfeited by the omission to mention buildings which do not enhance the risk.<sup>4</sup>

It has been held by a majority of the Court of Appeals of New York, that the answer of the applicant that there is no building within the distance inquired about, is not a constructive continuing condition that he will not himself erect one, and that his omitting to state, in reply to that inquiry, that he intends and has begun preparations to erect a barn within the specified distance, is not a breach of condition or a misrepresentation whereby the insurance is defeated, upon the ground that the inquiries put to the applicant for a fire policy being usually quite numerous and various, he is excused from making any statement which is not directly, pointedly, and literally called for.<sup>5</sup> As there is no provision in the policy bearing upon the subject, an answer that the space in question is vacant, might not be construed to be a condition that the assured should not, if he owned it himself, make such use of it as is usual in the vicinity. But the omission to

<sup>1</sup> *Trench v. Chenango County Mut. F. Ins. Co.* 7 Hill, N. Y. 122. See also *Tillou v. Kingston Mut. Ins. Co.* 5 N. Y. 405, 868, for partial forfeiture of a policy.

<sup>2</sup> *Burritt v. Saratoga County Mut. F. Ins. Co.* 7 Hill, N. Y. 188; *Frost v. Saratoga County Mut. Fire Ins. Co.* 5 Den. N. Y. 154; *Jennings v. Chenango County Mut. Ins. Co.* 2 id. 75; *Sexton v. Montgomery County Ins. Co.* 9 Barb. N. Y. 191; *Kennedy v. St. Lawrence County Mut. Ins. Co.* 10 id. 285; *Tebbetts v. Hamilton Ins. Co.* 1

All. Mass. 305; *Chaffee v. Cattaraugus Ins. Co.* 18 N. Y. 376; *Hardy v. Union Ins. Co.* 4 All. Mass. 217.

<sup>3</sup> *Masters v. Madison County Mut. Ins. Co.* 11 Barb. N. Y. 624.

<sup>4</sup> See also ruling of Mr. Justice Woodbury, *Nicoll v. Am. Ins. Co.* 3 Woodb. & M. C. C. 529; *Richmondville Seminary v. Hamilton Ins. Co.* 14 Gray, Mass. 459.

<sup>5</sup> *Gates v. Madison County Mut. Ins. Co.* 5 N. Y. 469, Mr. Justice Foot dissenting.

state, in reply to such an inquiry, an intention and preparation to erect a building on the space, seems to come fully within the principle and examples of concealment. The inquiry being in general as to buildings near enough to endanger the one insured, opinions might differ as to the distance at which such building might be; the effect, and the correctness of the answer to such an inquiry, can hardly be considered a condition on which the validity of the policy will depend, and the Court of Appeals of New York is accordingly of opinion that a policy could not be forfeited by an omission to mention a neighboring building under such an inquiry, unless it were a case of plain fraud.<sup>1</sup>

Where, to the inquiry as to the situation relative to other buildings within ten rods, the applicant stated the "nearest building," in a certain direction, was one which he named, omitting to specify another within that distance, the vicinity to which did not appear to be material to the risk, the New York Court of Appeals adjudged that the policy was not affected by the omission, on the ground that the applicant appeared, by his answer, to understand only the nearest building to be required to be named; and that the underwriters were bound to make further inquiry if they demanded that any others should be specified.<sup>2</sup>

The circumstance, that an application for a fire policy is drawn up by an agent of the insurers for procuring applications, on inspection of the building proposed for insurance, does not prevent the forfeiture of the policy by the falsification of the answer in respect to the distance of other buildings.<sup>3</sup>

873. *A reference in the policy, by way of recital or otherwise, to a survey furnished by the assured, for a description of the building insured, does not make it a part of the policy so as to require precise accuracy and conformity to the description; a substantial conformity is sufficient.*

It was so held by the Supreme Court and Court of Errors in New York, where the policy stated that the insured premises

<sup>1</sup> *Gates v. Madison County Mut. Ins. Co.* 2 N. Y. 43.

<sup>2</sup> *Ibid.*; *Hall v. People's Ins. Co.* 6 Gray, Mass. 185. There are two buildings "within fifty feet" is held a suffi-

cient statement, although one of them is within two feet. *Allen v. Charlestown Ins. Co.* 5 Gray, Mass. 384.

<sup>3</sup> *Kennedy v. St. Lawrence County Mut. Ins. Co.* 10 Barb. N. Y. 284.

were "more particularly described in the application and survey."<sup>1</sup>

A similar decision was made by the Superior Court of the City of New York, on a policy in a condition annexed to which it was provided, that, "if any person shall describe the property otherwise than it really is, so that it be insured at less than the rate of premium specified in the printed proposals, the insurance shall be void." An apartment specified in the plan as a "store for painted ware," was in fact occupied by the carpenter for doing the carpenter's work of the establishment. The court were of opinion, that, if the risk was not thereby enhanced so as to bring the building under a higher rate of premium, the policy was not affected.<sup>2</sup>

In these cases a distinction is suggested between marine and fire policies as to such statements, but I am not aware of any good ground for a different construction of equivalent clauses in these two descriptions of insurance.

A representation referred to in the policy, that there is to be an open fireplace, being of a promissory character, must be complied with within a reasonable time, or the underwriters will be discharged.<sup>3</sup>

A policy will be forfeited by the non-payment of an assessment on a premium or deposit note, under a condition to that effect in the policy ;<sup>4</sup> or suspended under a condition to that effect.<sup>5</sup>

Where the description is of a fact material to the risk, as in a policy upon goods contained in a framed house "filled in with brick," the court held the policy to be void because it was not so filled in.<sup>6</sup>

874. The condition that *the policy shall be void if the appli-*

<sup>1</sup> *Snyder v. The Farmers' Ins. & Loan Co.* 13 Wend. N. Y. 92; *Farmers' Ins. & Loan Co. v. Snyder*, 16 id. 481.

<sup>2</sup> *Delonguemere v. Traders' Ins. Co.* 2 Hall, N. Y. 589.

<sup>3</sup> *Murdock v. Chenango County Mut. Ins. Co.* 2 N. Y. 210.

<sup>4</sup> *Beadle v. Chenango Mut. Ins. Co.* 3 Hill, N. Y. 161. If under a by-law merely, which is not incorporated into

the policy, the court query, referring to the *Matter of the Long Island Railroad*, 19 Wend. N. Y. 37.

<sup>5</sup> *Blanchard v. Atlantic Ins. Co.* 33 N. H. 9.

<sup>6</sup> *Fowler v. Ætna Ins. Co.* 6 Cow. N. Y. 673; *S. C.* 7 Wend. N. Y. 270. In this case three juries successively gave verdicts for the assured.



*cant* shall "misrepresent or omit to communicate any circumstance which ought to be made known to the company in order to enable them to judge of the risk they have undertaken or are required to undertake," is held by Tindal, C. J., and Coltman, Maule, and Cresswell, Justices, to refer to the time of negotiating for and effecting the policy, and not to any subsequent time.<sup>1</sup>

So held in reference to insurance on a paper-machine, and other fixtures and apparatus for manufacturing paper, in a building represented, at the time of making the policy, to be used for the business of paper-making, which was discontinued, and, without notice to the underwriters, that of cleansing and drying cotton waste substituted and carried on by another person than the assured by the assured's permission, which the jury found to be more hazardous. It did not appear that the fire by which the loss happened was at all occasioned by this business.<sup>2</sup>

The decision of this case turned upon the question, whether the assured was bound by the stipulation above cited to give notice of the other business. In the other analogous case in the Queen's Bench, the drying of bark, being more hazardous than drying corn, which the furnace was represented to be used for, was only temporary and was gratuitous, and a use for which it was suitable.

874 a. Under the condition that the policy shall be void if the applicant shall answer falsely as to his title and incumbrances, or fail to make a full exposition of the title and incumbrances, incorrect answers will defeat the policy although given by mistake.<sup>3</sup>

A description by the assured of the property as "his," has been held to defeat the policy, where he is only tenant by curtesy,<sup>4</sup> mortgagee,<sup>5</sup> or part owner,<sup>6</sup> or has merely a bond for a deed,<sup>7</sup>

<sup>1</sup> *Pim v. Reid*, 6 Mann. & G. 1. See supra, No. 866 a, as to continuing promissory warranties.

<sup>2</sup> S. C., on authority of *Shaw v. Roberts*, 6 Ad. & E. 75, and 1 Nev. & P. 279.

<sup>3</sup> *Smith v. Bowditch F. Ins. Co.* 6 Cush. Mass. 448; *Draper v. Charter Oak Ins. Co.* 2 All. Mass. 569; *Loehner v. Home Ins. Co.* 17 Mo. 247; *Towne*

*v. Fitchburg Ins. Co.* 7 All. Mass. 51; *Cooper v. Farmers' Ins. Co.* 50 Penn. St. 299.

<sup>4</sup> *Leathers v. Farmers' Ins. Co.* 24 N H. 259.

<sup>5</sup> *Jenkins v. Quincy Ins. Co.* 7 Gray, Mass. 370.

<sup>6</sup> *Wilbur v. Bowditch Ins. Co.* 10 Cush. Mass. 446.

<sup>7</sup> *Smith v. Bowditch F. Ins. Co.* 6

or the property belongs to his wife.<sup>1</sup> Such a description has been held to be good where the assured has an absolute agreement for purchase, has paid part of the price, and is in possession;<sup>2</sup> or has possession under an assignment to him as a judgment creditor, and the time for redemption has expired;<sup>3</sup> or is in possession where the estate is subject to mortgage and the equity of redemption has been sold on execution but the assured is in possession with a right of redemption;<sup>4</sup> and so also where a lessee of land has insured the buildings, which he had a right to remove.<sup>5</sup> And also where A owned a building and B owned the stock, both of which are insured in one policy and described as belonging to A and B.<sup>6</sup> Where a mortgage and deed given without consideration in order to defraud creditors, but good between the parties, is not disclosed, the policy is defeated.<sup>7</sup> In general the record of a conveyance or mortgage does not supersede the obligation to disclose it.<sup>8</sup>

A mortgage paid though not discharged of record, is not an existing incumbrance;<sup>9</sup> but if the money to pay the debt has merely been placed in the hands of a third party for the purpose of payment, the mortgage is still an incumbrance.<sup>10</sup>

Where the incumbrance, not disclosed, is on only a part of the insured property, the policy is void,<sup>11</sup> both on the ground of the entirety of the contract, and because the concealment affects the lien of the underwriter where such a lien exists. This condi-

Cush. Mass. 448; *Lowell v. Middlesex Ins. Co.* 8 Cush. Mass. 127; *Falls v. Conway Ins. Co.* 7 All. Mass. 46.

<sup>1</sup> *Eminence Ins. Co. v. Jesse*, 1 Metc. Ky. 523.

<sup>2</sup> *Hough v. City F. Ins. Co.* 29 Conn. 10. See also *Chase v. Hamilton Mut. Ins. Co.* 22 Barb. N. Y. 527.

<sup>3</sup> *Clapp v. Union Ins. Co.* 27 N. H. 143.

<sup>4</sup> *Buffum v. Bowditch Ins. Co.* 10 Cush. Mass. 540.

<sup>5</sup> *Hope Ins. Co. v. Brolaskey*, 35 Penn. St. 282.

<sup>6</sup> *Peck v. New London Ins. Co.* 22 Conn. 575.

<sup>7</sup> *Treadway v. Hamilton Ins. Co.* 29 Conn. 68.

<sup>8</sup> *Packard v. Agawam Ins. Co.* 2 Gray, Mass. 334.

<sup>9</sup> *Hawkes v. Dodge Ins. Co.* 11 Wisc. 188; contra, *Warner v. Middlesex M. Ass. Co.* 21 Conn. 444.

<sup>10</sup> *Battles v. York Ins. Co.* 41 Me. 208.

<sup>11</sup> *Brown v. People's Ins. Co.* 11 Cush. Mass. 280; *Friesmuth v. Agawam Ins. Co.* 10 Cush. Mass. 587; *Smith v. Empire Ins. Co.* 25 Barb. N. Y. 497; *Gould v. York Ins. Co.* 47 Me. 403; *Day v. Charter Oak Ins. Co.* 51 Me. 91; contra, *Phoenix Ins. Co. v. Lawrence*, 4 Metc. Ky. 9.

tion refers to the date of the application and does not require the disclosure of a mortgage made after that date but before the issuing of the policy.<sup>1</sup>

A void prior policy importing a lien is not an incumbrance.<sup>2</sup> In some cases notice to the agent of the underwriters is held a sufficient compliance with the condition,<sup>3</sup> in others the assured is held responsible for the failure of the agent to inform the company.<sup>4</sup> A judgment against a certain fund in the hands of the assured not creating a lien is not an incumbrance.<sup>5</sup>

875. *On renewal of a policy in favor of an assignee, all the conditions and stipulations arising on the original representations referred to in the policy, or otherwise, still subsist.*<sup>6</sup>

876. *Fire policies not unfrequently limit the proportion of the value of the subject that shall be insured, either by a provision in the body of the policy, or the representations by the assured referred to in the policy, or by statute.*<sup>7</sup>

877. Under a public statute restricting insurance against fire to three fourths of the value of the property, the insurance on a greater proportion is held to render the policy inoperative as to the excess, but not to defeat it for that proportion.<sup>8</sup>

The value not being fixed by the policy, is to be determined by the jury under this provision.<sup>9</sup>

If the value is stated in the answers of the assured, he is thereby estopped to prove it to be greater.<sup>10</sup>

878. *The statement of a mere expectation in the policy, or in the answers referred to, is not a warranty of what is expected in a fire policy, any more than in a marine one.*

<sup>1</sup> Dutton v. New England Ins. Co. 29 N. H. 153.

<sup>2</sup> Jackson v. Farmers' Ins. Co. 5 Gray, Mass. 52.

<sup>3</sup> Masters v. Madison County Mut. Ins. Co. 11 Barb. N. Y. 624.

<sup>4</sup> Lowell v. Middlesex Ins. Co. 5 Cush. Mass. 127; Bowditch Ins. Co. v. Winslow, 3 Gray, Mass. 415; Abbott v. Shawmut Ins. Co. 3 All. Mass. 213; and see infra, No. 1876.

<sup>5</sup> Somerset Ins. Co. v. McAnally, 46 Penn. St. 41.

<sup>6</sup> Clark v. Manufacturers' Ins. Co. 8 How. 235.

<sup>7</sup> This provision is held to refer to the value at the time of loss. Nevins v. Rockingham Ins. Co. 25 N. H. 22; to the valuation in a valued policy, Lymcoming Ins. Co. v. Mitchell, 48 Penn. St. 367.

<sup>8</sup> Holmes v. Charlestown Fire Ins. Co. 10 Metc. Mass. 211; Egan v. Mutual Ins. Co. of Albany, 5 Den. N. Y. 326; Cumberland Co. v. Schell, 29 Penn. St. 31.

<sup>9</sup> Post v. Hampshire Mut. F. Ins. Co. 12 Metc. Mass. 555.

<sup>10</sup> Holmes v. Charlestown Mut. F. Ins. Co. 10 Metc. Mass. 211.

The description of the building to be "at present occupied as a dwelling-house, but to be occupied hereafter as a tavern, and privileged as such," is not a warranty of such occupancy, and the policy subsists while it is vacant.<sup>1</sup>

879. It is a common *condition* of fire policies *to be void in case of assignment* without the consent of the underwriters.<sup>2</sup>

This condition is broken by a general assignment of the assured's property,<sup>3</sup> but not if it is made for the benefit of creditors.<sup>4</sup> When insurance is on partnership property an assignment by one partner to the other is held to be a breach of the condition, but only as to the interest assigned.<sup>5</sup> A mere attempt to assign does not come within the condition.<sup>6</sup>

Under a provision that the policy is to be void on the transfer or termination of the "interest" of the assured, it is forfeited by a transfer of the policy.<sup>7</sup>

The consent of the underwriters that the policy may be assigned to a mortgagee, on his giving his note for the premium, will not, unless he gives the note, prevent the assignment from rendering the policy void.<sup>8</sup>

If the secretary of the company assents to an assignment, he is *primâ facie* presumed to be authorized.<sup>9</sup>

880. Another frequent condition is that the policy is to be void on the "sale," or "transfer," or "alienation" of the subject.

This provision is of no effect in case of an absolute sale and transfer, without a repurchase of the assured's insurable interest, since the insurance is thereby vacated for want of a subject.<sup>10</sup>

Under this condition the policy is not forfeited by the descent

<sup>1</sup> Catlin v. Springfield Ins. Co. 1 Sumn. C. C. 434; Hough v. City F. Ins. Co. 29 Conn. 10; Kimball v. Ætna Ins. Co. 9 All. Mass. 540.

<sup>2</sup> See c. 1, s. 10, No. 107, 108.

<sup>3</sup> Dey v. Poughkeepsie Ins. Co. 23 Barb. N. Y. 623.

<sup>4</sup> People v. Beigler, Hill & D., N. Y. 133.

<sup>5</sup> Hobbs v. Memphis Ins. Co. 1 Sneed,

Tenn. 444. Contra, Wilson v. Genesee Ins. Co. 16 Barb. N. Y. 511.

<sup>6</sup> Smith v. Monmouth Ins. Co. 50 Me. 96.

<sup>7</sup> Smith v. Saratoga Mut. Ins. Co. 1 Hill, N. Y. 497.

<sup>8</sup> Smith v. Saratoga Mut. Ins. Co. 3 Hill, N. Y. 508; 1 id. 497.

<sup>9</sup> Conover v. Mutual Ins. Co. of Albany, 3 Den. N. Y. 254.

<sup>10</sup> Supra, No. 86, 87, 185.



of the property to heirs,<sup>1</sup> or by a mere mortgage<sup>2</sup> so long as the assured remains in possession;<sup>3</sup> and a sale to secure a debt with a lease back to the vendor with right of repurchase has been considered as an equitable mortgage not defeating the policy.<sup>4</sup> But a conveyance absolute in terms, though made to secure a debt, has been held to make void the policy;<sup>5</sup> and it has been so held where an existing debt is a lien on the subject.<sup>6</sup>

It was held where the assured mortgaged the property and then, by deed recorded, conveyed his equity of redemption to a third party, taking a deed of defeasance from him which was not recorded, that the policy was forfeited,<sup>7</sup> and so held also where the property was mortgaged and sold under decree.<sup>8</sup>

Where a sale was made but was avoided for non-payment of the purchase money and the property reverted, it was held that the risk was merely suspended until such reversion,<sup>9</sup> and a sale with a simultaneous conveyance to a trustee to secure the purchase money has been held not to defeat the policy.<sup>10</sup>

An agreement to sell, and part payment made, is not an alienation, so long as the assured *remains* in possession<sup>11</sup> and no conveyance is made, and the estate remains as security to the assured for the fulfilment of the agreement,<sup>12</sup> but it has been held

<sup>1</sup> *Burbank v. Rockingham Ins. Co.* 24 N. H. 550.

<sup>2</sup> *Rollins v. Columbian F. Ins. Co.* 25 N. H. 200; *Folsom v. Belknap Ins. Co.* 30 N. H. 231; *Pollard v. Somerset Ins. Co.* 42 Me. 221.

<sup>3</sup> *Jackson v. Massachusetts Ins. Co.* 23 Pick. Mass. 418; *Rice v. Tower*, 1 Gray, Mass. 426. Where the mortgagee takes possession, see *Jacobs v. Eagle Ins. Co.* 7 All. Mass. 132.

<sup>4</sup> *Holbrook v. American Ins. Co.* 1 Curt. C. C. 193; *Smith v. Monmouth Ins. Co.* 50 Me. 96.

<sup>5</sup> *Western Ins. Co. v. Riker*, 10 Mich. 279.

<sup>6</sup> *Ayres v. Hartford F. Ins. Co.* 17 Iowa, 176.

<sup>7</sup> *Tomlinson v. Monmouth Ins. Co.*

47 Me. 232; *Lawrence v. Holyoke Ins. Co.* 11 All. Mass. 387.

<sup>8</sup> *Mount Vernon Ins. Co. v. Summit Ins. Co.* 10 Ohio St. 347.

<sup>9</sup> *Power v. Ocean Ins. Co.* 19 La. 28.

<sup>10</sup> *Morrison's Adm'rs v. Tennessee Ins. Co.* 18 Mo. 262.

<sup>11</sup> *Davis v. Quincy Ins. Co.* 10 All. Mass. 113; and it was so held in one case where the vendee took possession. *Shotwell v. Jefferson Ins. Co.* 5 Bosw. N. Y. 247. See also *Lane v. Maine F. Ins. Co.* 12 Me. 44.

<sup>12</sup> *Trumbull v. Portage Ins. Co.* 12 Ohio, 305; *Tittmore v. Vt. M. F. Ins. Co.* 20 Vt. 546. The Court remarked in this case that a conveyance and simultaneous reconveyance by mortgage

that in such a case the vendor recovers the insurance only for the benefit of the vendee if the sale is completed,<sup>1</sup> nor is an agreement to represent the property as sold, to prevent its being attached by creditors.<sup>2</sup>

An assignment in trust for the benefit of creditors<sup>3</sup> under insolvency proceedings,<sup>4</sup> commenced by the assured,<sup>5</sup> forfeits the policy.

The policy is not forfeited under this condition by seizure by an attaching creditor,<sup>6</sup> or by a compulsory sale on execution, so long as the assured has a right of redemption on payment of the debt.<sup>7</sup>

A dissolution of a partnership terminates the risk on the partnership property,<sup>8</sup> but where the partners had agreed that in case of dissolution one partner might continue the business, and upon the death of one partner the survivor continued the business until the loss, it was held that, as surviving partner, he could recover for goods belonging to the firm but not for goods bought after the death of his copartner.<sup>9</sup>

The transfer by a partner or joint owner to his copartners or coproprietors of his interest in the joint property covered by

would be an alienation; but this dictum is at least questionable. *Masters v. Madison Ins. Co.* 11 Barb. N. Y. 624; *Hitchcock v. North Western Ins. Co.* 26 N. Y. 68. See *supra*, No. 189, 294.

<sup>1</sup> *Reed v. Lukens*, 44 Penn. St. 200.

<sup>2</sup> *Orell v. Hampden Ins. Co.* 13 Gray, Mass. 431.

<sup>3</sup> *Dadmun Manufacturing Co. v. Worcester Ins. Co.* 11 Metc. Mass. 429. See also *Lazarus v. General Int. Ins. Co.* 5 Pick. Mass. 76; *Lazarus v. Commonwealth Ins. Co.* 19 Pick. Mass. 81; and *supra*, No. 107.

<sup>4</sup> *Moore v. Protection Ins. Co.* 29 Me. 97.

<sup>5</sup> *Young v. Eagle Ins. Co.* 14 Gray, Mass. 150. This being a mutual company the assignment was held to defeat the claim of a mortgagee to whom the policy was made payable. See *Haz-*

*ard v. Franklin Ins. Co.* 7 R. I. 429, to the same point, the policy in that case having been assigned to the mortgagee; contra where the assured remained in possession. *Phoenix Ins. Co. v. Lawrence*, 4 Metc. Ky. 9.

<sup>6</sup> *Marigny v. Home Ins. Co.* 13 La. Ann. 338; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. Ky. 9.

<sup>7</sup> *Strong v. Manufacturers' Ins. Co.* 10 Pick. Mass. 40; *Clark v. New England Ins. Co.* 6 Cush. Mass. 342. Contra, under a condition against incumbrances. *Campbell v. Hamilton Ins. Co.* 51 Me. 69.

<sup>8</sup> *Dreher v. Ætna Ins. Co.* 18 Mo. 128. So does a partition of joint property. *Barnes v. Union Ins. Co.* 51 Me. 110.

<sup>9</sup> *Wood v. Rutland Ins. Co.* 31 Vt. 552.

one policy, is held to defeat the policy<sup>1</sup> even in the hands of an assignee.<sup>2</sup>

Where a mortgagee insured his interest, and then bought the equity of redemption, this was held not to be an alienation.<sup>3</sup>

From the general rule that the acts of the assignor after assignment cannot affect the assignee, the interest of an assignee of the policy as collateral cannot be affected by the alienation of the property by the assured.<sup>4</sup>

Two buildings being insured in one policy for a specific amount on each, an alienation of one is held to avoid the policy only to the amount insured on it.<sup>5</sup> A partial sale of merchandise does not affect the policy, that being the proper use of the subject.<sup>6</sup>

A stipulation for notice of any sale is not waived by prior consent to a sale,<sup>7</sup> and where there are two policies between the same parties upon different interests in the same subject, consent to the sale of the subject of one policy is not consent to the sale of the subject of the other.<sup>8</sup>

It is held that a request for consent to the assignment of the policy is notice of an interest acquired or intended in the property.<sup>9</sup>

<sup>1</sup> *Finley v. Lycoming Ins. Co.* 30 Penn. St. 311; *Hartford F. Ins. Co. v. Ross*, 23 Ind. 179; *Keeler v. Niagara Ins. Co.* 16 Wisc. 523.

<sup>2</sup> *Buckley v. Garrett*, 47 Penn. St. 204. In New York it is held, in *Hoffman v. Aetna Ins. Co.* 32 N. Y. 405, that a transfer by one partner to his co-partner does not avoid the policy, overruling to some extent the doctrine in *Tillou v. Kingston Ins. Co.* 5 N. Y. 405, which only saved the interest of the assignee. In Tennessee such a transfer avoids the policy, but saves the interest of an assignee. *Hobbs v. Memphis Ins. Co.* 1 Sneed, Tenn. 444.

<sup>3</sup> *Heaton v. Manhattan Ins. Co.* 7 R. I. 502.

<sup>4</sup> *Boynton v. Clinton Ins. Co.* 16 Barb. N. Y. 254. *Contra, Hoxsie v.*

*Providence Ins. Co.* 6 R. I. 517 (but in this case the assignment of the policy was imperfect); *Grosvenor v. Atlantic Ins. Co.* 17 N. Y. 391, overruling *Traders' Ins. Co. v. Robert*, 9 Wend. N. Y. 404, and *Tillou v. Kingston Ins. Co.* 5 N. Y. 405; *Hazard v. Franklin, Ins. Co.* 7 R. I. 429.

<sup>5</sup> *Clark v. New England Ins. Co.* 6 Cush. Mass. 342; *Western Ins. Co. v. Riker*, 10 Mich. 279.

<sup>6</sup> *West Branch Ins. Co. v. Helfenstein*, 40 Penn. St. 289.

<sup>7</sup> *Eddy v. Tennessee Ins. Co.* 21 Mo. 587.

<sup>8</sup> *Loring v. Manufacturers' Ins. Co.* 8 Gray, Mass. 28.

<sup>9</sup> *Hooper v. Hudson River Ins. Co.* 17 N. Y. 424.

The burden of proving alienation is on the underwriters.<sup>1</sup>

Under a stipulation annulling the policy if the property is levied on or taken into possession, a notice of levy, though as effectual as actual taking possession, does not annul the policy,<sup>2</sup> nor does a wrongful levy on the property insured.<sup>3</sup>

§81. It is a frequent condition of a fire policy that it shall be void if other insurance is effected on the subject without notice to and consent of the underwriters. This condition is limited to other insurance by the same assured on the same subject.<sup>4</sup>

When the charter of the company absolutely forbids other insurance, the policy is forfeited by such insurance;<sup>5</sup> and where the condition is imposed by a by-law printed on the policy<sup>6</sup> or otherwise made a part of it, the same is binding.<sup>7</sup>

The other insurance must be by the same party, and prior<sup>8</sup> or subsequent<sup>9</sup> insurance by a third party who has an interest in the property without the privity of the original assured, will not affect the policy. An assignee of a policy having previously a policy on the same subject is bound to give the notice;<sup>10</sup> and the assignee is bound by the condition.<sup>11</sup>

A mortgager is bound to give notice of other insurance made by him for the benefit of, and assigned to the mortgagee as collateral security;<sup>12</sup> and the rule is the same if the subsequent insurance is effected by the mortgagee with consent of the mortgager, though it operates to extinguish the debt.<sup>13</sup> But where

<sup>1</sup> *Orrell v. Hampden Ins. Co.* 13 Gray, Mass. 431.

<sup>2</sup> *Commonwealth Ins. Co. v. Berger*, 42 Penn. St. 285.

<sup>3</sup> *Philadelphia Ins. Co. v. Mills*, 44 Penn. St. 241.

<sup>4</sup> *Williams's Adm'r v. Cincinnati Ins. Co.* Wright, Ohio, 542; and see *Harris v. Ohio Ins. Co.* 5 Ohio, 461; *Franklin Ins. Co. v. Drake*, 2 B. Monr. Ky. 51; *Lowndsbury v. Protection Ins. Co.* 8 Conn. 459.

<sup>5</sup> *Blanchard v. Atlantic Ins. Co.* 33 N. H. 9.

<sup>6</sup> *Hygum v. Aetna Ins. Co.* 11 Iowa, 21.

<sup>7</sup> *Simpson v. Pennsylvania Ins. Co.*

38 Penn. St. 250; *Gilbert v. Phoenix Ins. Co.* 36 Barb. N. Y. 372.

<sup>8</sup> *Tyler v. Aetna Ins. Co.* 12 Wend. N. Y. 507; *Aetna Ins. Co. v. Tyler*, 16 id. 385.

<sup>9</sup> *Nichols v. Fayette Ins. Co.* 1 All. Mass. 63; *Woodbury Ass. v. Charter Oak Ins. Co.* 31 Conn. 517.

<sup>10</sup> *Walton v. La. State Mut. F. Ins. Co.* 2 Rob. La. 563; *Leavitt v. Western Mar. & Fire Ins. Co.* 7 id. 351.

<sup>11</sup> *Leavitt v. Western M. & F. Ins. Co.* 7 Rob. La. 351.

<sup>12</sup> *Carpenter v. Washington Ins. Co.* 16 Pet. 495.

<sup>13</sup> *Holbrook v. American Ins. Co.* 1 Curt. C. C. 193.



the first is assigned to the mortgagee, and the mortgager then makes other insurance and afterwards redeems the mortgage, it is held that he is not bound to give notice of the second policy.<sup>1</sup>

The insurance must be on the same subject. A policy on a building will not be forfeited by a subsequent one on the goods in it;<sup>2</sup> but insurance upon a part of the subject of the original policy comes within the condition.<sup>3</sup>

The condition may be limited to subsequent insurance,<sup>4</sup> and permission to "keep insured" authorizes the continuance of a prior policy.<sup>5</sup> In New York the condition is held not to apply to the renewal of a policy mentioned in the application,<sup>6</sup> but this is doubted in a Massachusetts case which decides that the policy is forfeited by substituting insurance in another company though for a less amount than that mentioned in the policy.<sup>7</sup> The recital of insurance which does not exist at the time does not authorize the assured to make such insurance.<sup>8</sup>

A void policy, prior or subsequent, does not come within the condition;<sup>9</sup> and the assured may set up the invalidity of such other policy, although he has received payment on it;<sup>10</sup> but the underwriters need only show the other insurance to be *primâ facie* valid.<sup>11</sup>

Under two successive policies both with the condition of avoid-

<sup>1</sup> *Traders' Ins. Co. v. Robert*, 9 Wend. N. Y. 404; *Robert v. Traders' Ins. Co.* 17 id. 631.

<sup>2</sup> *Jones v. Maine Mut. F. Ins. Co.* 18 Me. 155.

<sup>3</sup> *Associated Firemen's Ins. Co. v. Assum*, 5 Md. 165; *Kimball v. Howard Ins. Co.* 8 Gray, Mass. 33.

<sup>4</sup> *Mussey v. Atlas Ins. Co.* 14 N. Y. 79.

<sup>5</sup> *Philbrook v. New England Ins. Co.* 37 Me. 137. See also *Kimball v. Howard Ins. Co.* ut supra; *Blake v. Exchange Ins. Co.* 12 Gray, Mass. 265.

<sup>6</sup> *Brown v. Cattaraugus Ins. Co.* 18 N. Y. 385. See also *Proprietors v. Hillsborough Ins. Co.* 19 N. H. 580.

<sup>7</sup> *Burt v. People's Ins. Co.* 2 Gray, Mass. 397.

<sup>8</sup> *Conway Tool Co. v. Hudson Riv. Ins. Co.* 12 Cush. Mass. 144. The insurance was made for the same amount, but in different companies from those mentioned.

<sup>9</sup> *Philbrook v. New England Ins. Co.* 37 Me. 137; *Jackson v. Farmers' Ins. Co.* 5 Gray, Mass. 52.

<sup>10</sup> *Hardy v. Union Ins. Co.* 4 All. Mass. 217. But it was held in Iowa, where the subsequent policy was void only for misdescription, that payment upon it was a conclusive presumption of its validity in a suit on the prior policy. *David v. Hartford Ins. Co.* 13 Iowa, 69.

<sup>11</sup> *Schenck v. Mercer Ins. Co.* 4 Zab. N. J. 447; *Bigler v. New York Ins. Co.* 20 Barb. N. Y. 635.

ance by other insurance, prior or subsequent, without notice, and no notice on either, the first is held in Massachusetts, Pennsylvania, New Hampshire, and New York to continue valid, the second being void for want of the notice, and so not being an insurance,<sup>1</sup> which seems to be the better doctrine, though a different judgment is given by the Supreme Court of the United States,<sup>2</sup> on the ground that it depended upon the underwriters on the second policy whether that should be treated as void. But if the second policy recites the first it is valid, though the first may be void;<sup>3</sup> and an agreement to postpone the second insurance until the termination of the first, keeps the first policy alive.<sup>4</sup>

No time for giving notice of other insurance being specified, it must be given without unreasonable delay, especially delay till after a loss.<sup>5</sup>

Where the charter and regulations of a mutual company authorize only the president and secretary to assent to other insurance, it is held that the assent of a director or the secretary only, is not sufficient.<sup>6</sup> Under a stipulation for the consent of the directors, the consent of two, the others being present and not objecting, is sufficient.<sup>7</sup> If the policy stipulates for "consent in writing" oral consent is insufficient.<sup>8</sup> Such a stipulation is not complied with or waived merely by making a request for allowance of other insurance in the application, or by the fact that both policies were obtained through the same agent.<sup>9</sup>

A recital of other insurance in the policy is sufficient compliance with a condition that other insurance must be signified by endorsement signed by the president;<sup>10</sup> endorsement by an agent

<sup>1</sup> *Jackson v. Mass. Mut. Ins. Co.* 23 Pick. Mass. 418; *Clark v. New England Ins. Co.* 6 Cush. Mass. 342; *Stacey v. Franklin F. Ins. Co.* 2 Watts & S. Penn. 506; *Gale v. Belknap Ins. Co.* 41 N. H. 170; *Mussey v. Atlas Ins. Co.* 14 N. Y. 79.

<sup>2</sup> *Carpenter v. Wash. Ins. Co.* 16 Pet. 495.

<sup>3</sup> *Forbush v. Western Ins. Co.* 4 Gray, Mass. 337.

<sup>4</sup> *Atlantic Ins. Co. v. Goodall*, 29 N. H. 182.

<sup>5</sup> *Barrett v. Mut. F. Ins. Co.* 7 Cush. Mass. 175; *Mellen v. Hamilton F. Ins. Co.* 5 Du. N. Y. 101; 17 N. Y. 609.

<sup>6</sup> *Stark Ins. Co. v. Hurd*, 19 Ohio, 149.

<sup>7</sup> *Goodall v. New England Ins. Co.* 25 N. H. 169.

<sup>8</sup> *Hale v. Mechanics' Ins. Co.* 6 Gray, Mass. 169.

<sup>9</sup> *Forbes v. Agawam Ins. Co.* 9 Cush. Mass. 470.

<sup>10</sup> *Proprietors v. Hillsborough Ins. Co.* 19 N. H. 580.

is compliance with a stipulation for "endorsement by the secretary," such having been the usual practice.<sup>1</sup> A verbal notice is not sufficient under a stipulation that other insurance shall be endorsed on the policy.<sup>2</sup> Verbal notice to the agent of the company is held insufficient where the policy provides that notice of other insurance shall be "mentioned in or endorsed upon the policy;"<sup>3</sup> or "endorsed on the policy or otherwise acknowledged in writing;"<sup>4</sup> or "noted by endorsement."<sup>5</sup> A stipulation for notice by endorsement or "otherwise" is satisfied by notice acknowledged by the secretary.<sup>6</sup>

The condition that notice of other insurance shall be endorsed upon or mentioned in the policy or acknowledged in writing is not satisfied by proof that it was known to the underwriters;<sup>7</sup> although known at the time of making the policy, and orally assented to and the policy is filled up without instructions from the assured.<sup>8</sup>

Where the policy requires merely notice of other insurance it is sufficient to mention it in the policy,<sup>9</sup> or to give notice to the agent of the company;<sup>10</sup> but the fact that the same agent effected both policies is not constructive notice to the first underwriters.<sup>11</sup>

A stipulation for notice does not authorize the underwriters to impose new conditions.<sup>12</sup>

Notice of a prior policy as being on the same subject is sufficient, though it is on the same and other subjects,<sup>13</sup> or covers

<sup>1</sup> *Peck v. New London Ins. Co.* 22 Conn. 575.

<sup>2</sup> *Hutchinson v. Western Ins. Co.* 21 Mo. 97.

<sup>3</sup> *Pendar v. American Ins. Co.* 12 Cush. Mass. 469.

<sup>4</sup> *Kimball v. Howard Ins. Co.* 8 Gray, Mass. 33. See also *Fabyan v. Union M. F. Ins. Co.* 33 N. H. 203.

<sup>5</sup> *Gilbert v. Phoenix Ins. Co.* 36 Barb. N. Y. 372.

<sup>6</sup> *Potter v. Ontario and Livingston M. Ins. Co.* 5 Hill, N. Y. 147.

<sup>7</sup> *Carpenter v. Washington Ins. Co.* 16 Pet. 495.

<sup>8</sup> *Barrett v. Mut F. Ins. Co.* 7 Cush.

Mass. 175. See also *Schenck v. Mercer Ins. Co.* 4 Zab. N. J. 447.

<sup>9</sup> *Ames v. New York Ins. Co.* 14 N. Y. 253.

<sup>10</sup> *McEwen v. Montgomery Ins. Co.* 5 Hill, N. Y. 101; *Sexton v. Same*, 9 Barb. N. Y. 129; *Wilson v. Genesee Ins. Co.* 16 Barb. N. Y. 511. Such notice may be verbal; *Schenck v. Mercer Ins. Co.* 4 Zab. N. J. 447.

<sup>11</sup> *Mellen v. Hamilton Ins. Co.* 17 N. Y. 609.

<sup>12</sup> *Westlake v. St. Lawrence Ins. Co.* 14 Barb. N. Y. 206.

<sup>13</sup> *Liscom v. Boston Mut. F. Ins. Co.* 9 Metc. Mass. 205; *Haley v. Dorchester Ins. Co.* 1 All. Mass. 536.

only a part;<sup>1</sup> but notice, saying at the same time it is not on the same subject, is not good notice.<sup>2</sup>

Endorsement on a separate piece of paper pasted on is a good endorsement.<sup>3</sup>

882. It is an ordinary condition not to carry on in the building insured, or to which the policy refers, any one of certain specified *hazardous trades*, or any such trade generally, without specification, except with the consent of the insurers. Under this condition the insurance is defeated by a use specified as "hazardous," though not more hazardous than that authorized,<sup>4</sup> but not by carrying on in the building so much of such hazardous business as is auxiliary and requisite to the authorized use; as by appropriating a room in a china-ware factory for the carpenter's work usually done in connection with such an establishment.<sup>5</sup>

An enumeration of "house building or repairing" in the list of hazardous trades does not include the repairing of the building insured.<sup>6</sup>

If the policy is conditioned to be made void by unauthorized use, the cause of the loss is immaterial, and the fact that it was carried on by a tenant without the knowledge of the landlord, the assured, is held to be no defence,<sup>7</sup> or by the mortgager after assignment of the policy to the mortgagee.<sup>8</sup>

It is for the jury to decide whether the use made of the building is auxiliary to that authorized.<sup>9</sup>

Where two buildings are insured by one policy under stipulations applicable to both, an unauthorized use of one makes void the insurance on both.<sup>10</sup>

Where a building was insured for one hazardous use, this was

<sup>1</sup> McMahon v. Portsmouth Ins. Co. 22 N. H. 15.

<sup>2</sup> Stacey v. Franklin Ins. Co. 2 Watts & S. Penn. 507.

<sup>3</sup> Pennsylvania Ins. Co. v. Bowman, 44 Penn. St. 89.

<sup>4</sup> Foster v. Belknap Ins. Co. 30 N. H. 231. See also Wall v. East River Ins. Co. 7 N. Y. 370.

<sup>5</sup> Delonguemere v. Tradesmen's Ins. Co. 2 Hall, N. Y. 589.

<sup>6</sup> Grant v. Howard Ins. Co. 5 Hill, N. Y. 10.

<sup>7</sup> Howell v. Baltimore Soc. 16 Md. 377. See also Farmers' Ins. Co. v. Simmons, 30 Penn. St. 299.

<sup>8</sup> Hoxsie v. Providence Ins. Co. 6 R. I. 517.

<sup>9</sup> Girard Ins. Co. v. Stephenson, 37 Penn. St. 293.

<sup>10</sup> Lee v. Howard F. Ins. Co. 3 Gray, Mass. 583.



held to allow another hazardous use of the same class not of greater risk.<sup>1</sup>

883. An ordinary condition is not to *store certain specified articles* in the insured building, or that to which the insurance refers. *Other stipulations relative to enhancements of the risk* are frequently made.

It has been held, that a reasonable quantity of the excepted article may be kept, where it is properly auxiliary, or usually belongs, to the business or use of the building expressly or impliedly permitted by the policy :

As the keeping of a cask of oil and one of spirit, for retail purposes, in a building used as a grocery shop, the articles being usually a part of such a stock, though they were specified as hazardous :<sup>2</sup>

Or keeping on hand spirituous liquors in quantity sufficient for boarders in the house, under the same condition.<sup>3</sup>

The same doctrine is held of keeping a small quantity of gunpowder in buildings insured as "stores."<sup>4</sup>

So, cotton in bales being specified as hazardous, the keeping of a sufficient quantity for sale, under a policy upon a stock of a dry goods shop, does not forfeit the policy.<sup>5</sup>

So a policy on the "stock of a manufacturer of brass clocks" allows the keeping of excepted articles belonging to the business.<sup>6</sup>

So the having upon the premises the excepted article for the

<sup>1</sup> Smith v. Mechanics' Ins. Co. 32 N. Y. 399.

Langdon v. N. Y. Equitable Fire Ins. Co. 2 Hall, N. Y. 226 ; N. Y. Equitable Ins. Co. v. Langdon, 6 Wend. N. Y. 623 ; Niagara F. Ins. Co. v. De Graff, 12 Mich. 124 ; Haley v. Dorchester Ins. Co. 12 Gray, Mass. 545. But in Massachusetts the court refuse to admit evidence that hazardous articles are usually kept in the buildings used as described in the policy ; as rags in a dry goods and grocery store ; Macomber v. Howard F. Ins. Co. 7 Gray, Mass. 257 ; oil, sulphur, and matches in a grocery store ; Whitmarsh v. Charter Oak Ins. Co. 2 All. Mass. 581. In Rathbone v. City

Ins. Co. 31 Conn. 193, the court inclined to the opinion that the stipulation was of no avail unless the goods were actually hazardous.

<sup>3</sup> Rafferty v. New Brunswick Fire Ins. Co. 3 Harr. N. J. 480.

<sup>4</sup> Duncan v. Sun Fire Ins. Co. 6 Wend. N. Y. 488 ; Leggett v. Aetna Ins. Co. 10 Rich. So. C. 202 ; Bowman v. Pacific Ins. Co. 27 Mo. 152 ; Phoenix Ins. Co. v. Taylor, 5 Minn. 492.

<sup>5</sup> Moore v. Protection Ins. Co. 29 Me. 97.

<sup>6</sup> Bryant v. Poughkeepsie Ins. Co. 17 N. Y. 200, sustaining S. C. 21 Barb. N. Y. 154.

purpose of making repairs, is not inconsistent with this condition:

As tar for tarring the building: <sup>1</sup>

Or oil and spirits of turpentine for painting it: <sup>2</sup>

Nor does a casual deposit of excepted articles. <sup>3</sup>

A condition not to use camphene prohibits its manufacture, <sup>4</sup> and not to keep it includes its use for lighting. <sup>5</sup> Where a building is insured as a printing-office, the prohibition of the use of camphene is held not to extend to its use for cleaning type. <sup>6</sup>

The condition that *notice* should be given to the underwriters of any "material" increase of the risk on a mill, and their consent should be obtained, is construed by the Court of Appeals, in Maryland, to distinguish a "material" increase from one that is not to be so considered. And it was held that this condition did not require *notice of repairs* necessary and appropriate for rendering the mill useful and profitable. <sup>7</sup>

It was a condition of a *policy* upon a cabinet-maker's shop that it should be *void*, "if any steam-engine should be introduced, or used, or any description of fire-heat other than common fireplaces, or any process of fire-heat should be carried on, or the risk should be increased" and the same not stated and allowed. Parke, B., and the other Barons of the English Court of Exchequer, adjudged the policy to have been made void by putting up on the premises a small steam-engine and boiler by way of experiment in turning a lathe, for the purpose of determining whether to retain the same in the assured's shop to be used in his business. <sup>8</sup>

Under the condition that notice of alteration shall be given, and if the risk is not increased, it shall continue, such notice is not

<sup>1</sup> Dobson v. Sothby, 1 Mood. & M. 90.

<sup>2</sup> O'Neil v. Buffalo F. Ins. Co. 3 N. Y. 123.

<sup>3</sup> Hynds v. Schenectady Ins. Co. 11 N. Y. 554, sustaining S. C. 16 Barb. N. Y. 119.

<sup>4</sup> Mead v. North Western Ins. Co. 7 N. Y. 530.

<sup>5</sup> Westfall v. Hudson River Ins. Co. 12 N. Y. 289.

<sup>6</sup> Harper v. City Ins. Co. 1 Bosw. N. Y. 520; Same v. Albany Ins. Co. 17 N. Y. 194; Same v. New York Ins. Co. 22 N. Y. 441.

<sup>7</sup> Allen v. Hartford County Mut. F. Ins. Co. 2 Md. 111.

<sup>8</sup> Glen v. Lewis, 8 Exch. 607; 17 Eng. Jur. 842; 20 Eng. L. & Eq. 364. See also Stokes v. Cox, 1 Hurlst. & N. Exch. 320, 533; 37 Eng. L. & Eq. 561; 38 id. 437.

indispensable.<sup>1</sup> In giving such notice the same degree of accuracy is required as in disclosing facts in the application.<sup>2</sup>

A statement *that there was no stove in a building*, the same being then in the process of being built, was construed, in the particular case, to be a continuous stipulation against there being one during the period of the insurance.<sup>3</sup>

It is held by the Supreme Court in Connecticut, that a statement in reply to inquiries respecting the *watch kept* in a factory, must continue to be complied with according to the plain import, and is not cancelled and controlled by proof of a usage in the place where the factory is situated.<sup>4</sup>

Describing a *building to be occupied as a private residence*, is not a stipulation that it shall constantly be so occupied, and not be at all vacant during the continuance of the risk.<sup>5</sup>

884. Under the *stipulation to submit to examination* on oath, the assured, having once submitted to examination, needs not be examined again, though he had then consented to answer further.<sup>6</sup> And delay by the assured to be examined is excused by the necessity to remove his family during an epidemic.<sup>7</sup>

885. It is a usual condition in fire insurance, that the assured shall produce certain *certificates of a loss*, and *the assured's books*, and *the particulars of the loss*, and *other exhibits* are required by some companies.<sup>8</sup>

Non-compliance with a condition to produce the certificate of a minister and church-warden, was held by Eyre, C. J., and Buller and Rook, Justices, of the English Common Pleas, to be excused, on proof of the groundless refusal of the certificate by those persons.<sup>9</sup> Lord Kenyon and his associates held, that the produc-

<sup>1</sup> Perry Ins. Co. v. Stewart, 19 Penn. Y. 122; Blood v. Howard Ins. Co. St. 45. Contra, where the policy stipulated that the assured should not recover without such notice. Simpson v. Pennsylvania Ins. Co. 38 Penn. St. 250.

<sup>2</sup> Calvert v. Hamilton Ins. Co. 1 All. 12 Cush. Mass. 472.  
<sup>6</sup> Moore v. Protection Ins. Co. 29 Me. 97. But if required he must submit to a second examination. Bonner v. Home Ins. Co. 13 Wis. 677.

<sup>3</sup> Williams v. New England Mut. F. Ins. Co. 31 Me. 219.  
<sup>7</sup> Phillips v. Protection Ins. Co. 14 Mo. 220.

<sup>4</sup> Glendale Woollen Co. v. Protection Ins. Co. 21 Conn. 19.  
<sup>8</sup> Jube v. Brooklyn Ins. Co. 28 Barb. N. Y. 412; Davis v. Davis, 49 Me. 282.

<sup>5</sup> O'Neil v. Buffalo F. Ins. Co. 3 N. 574.  
<sup>9</sup> Wood v. Worseley, 2 H. Blackst.

tion of the document could not be dispensed with on such proof.<sup>1</sup>

Where the rules of a fire office required that a certificate of any loss, by the nearest disinterested magistrate, should be produced, the certificate of the certifying magistrate that he was disinterested, was held to be sufficient *primâ facie* evidence of the fact. Very slight proof that the certifying magistrate is the nearest one is sufficient.<sup>2</sup>

A *certificate* of the loss given *by a minister* known by the underwriters not to be the "nearest," as required by the condition of the policy, without objection on this account, is a waiver of objection on their part.<sup>3</sup>

It is held by the Supreme Court of New York, and by Mr. Chancellor Walworth, in giving his opinion in the Court of Errors in New York, that where a policy requires a certificate of certain persons as to a loss, "it is not necessary that such certificate should be in the precise words mentioned in the policy," but that it is sufficient if it is evidently equivalent.<sup>4</sup>

886. *Notice of loss and exhibits stipulated for must be given as stipulated for and within the stipulated time.*<sup>5</sup>

It being stipulated that on loss by fire the assured shall give immediate notice, and "within three months deliver accounts exhibiting the full particulars of the loss," the giving in of the exhibit is held by the English Exchequer Chamber to be a condition precedent to the right of action on the policy.<sup>6</sup>

The stipulation for notice of loss "forthwith," means as soon as it can be conveniently given, and be reasonably expected.<sup>7</sup>

A condition to give notice of loss forthwith, is not violated by delay while the assured is necessarily occupied in taking measures to save himself and his family from an epidemic prevailing in the place at the time.<sup>8</sup>

<sup>1</sup> *Worseley v. Wood*, 6 Term, 710.

Md. 87. See also *Kingsley v. New*

<sup>2</sup> *Cornell v. Le Roy*, 9 Wend. N. Y. 163.

England Ins. Co. 8 Cush. Mass. 393.

<sup>3</sup> *O'Neil v. Buffalo F. Ins. Co.* 3 N. Y. 123.

<sup>6</sup> *Mason v. Harvey*, 8 Exch. 819; 20 Eng. L. & Eq. 541.

<sup>4</sup> *Ætna F. Ins. Co. v. Tyler*, 16 Wend. N. Y. 385.

<sup>7</sup> *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278.

<sup>5</sup> *Franklin Ins. Co. v. Hamill*, 6 Gill,

<sup>8</sup> *Phillips v. Protection Ins. Co.* 14 Mo. 220.



A delay of four months not accounted for, is held to be a forfeiture of claim for loss.<sup>1</sup>

Affidavits taken on behalf of the underwriters and delivered to their agent within thirty days after the loss, may be used by the assured to prove due notice of the loss within that time, according to the condition in a policy containing nothing to the contrary.<sup>2</sup>

887. If, *under a stipulation that the underwriters may, in case of loss, have twenty days to elect to replace damaged articles, the assured removes them to prevent an examination of them, he incurs against himself the presumption of fraud.*<sup>3</sup>

888. There is usually a condition of forfeiture in these policies for false or fraudulent statements or affidavits of the amount of loss.

An over-estimate of the loss is not a forfeiture under this condition :<sup>4</sup>

As where the assured made affidavit to £1,085, and the verdict was for £500 ;<sup>5</sup>

Or where he estimated it at \$2,800, and the verdict was for \$1,853.<sup>6</sup>

889. The *underwriters may expressly or by implication waive their right to object that the policy is void or forfeited, or to claim compliance on the part of the assured with any condition or stipulation express or implied ;*<sup>7</sup> as by omitting to make inquiries and demand further statements of the assured.<sup>8</sup>

890. Some fire policies have a clause for a *submission of the question as to the amount of loss, to arbitration.*

Under such an agreement in an English policy, that the "reference should be subject to such rules and conditions as are

<sup>1</sup> *McEvers v. Lawrence, Hoffm. Ch. N. Y. 173.*

<sup>2</sup> *Sexton v. Montgomery Ins. Co. 9 Barb. N. Y. 191.*

<sup>3</sup> *New York F. Ins. Co. v. Delavan, 8 Paige, Ch. N. Y. 419.*

<sup>4</sup> *Hoffinan v. Western F. & Mar. Ins. Co. 1 Rob. La. 216. But see Wall v. Howard Ins. Co. 51 Me. 32.*

<sup>5</sup> *Levy v. Bailie, 7 Bingh. 349.*

<sup>6</sup> *Moore v. Protection Ins. Co. 29 Me. 97. See also Franklin Ins. Co. v. Culver, 6 Ind. 137. The false swearing must be intentional. Marion v. Great Republic Ins. Co. 33 Mo. 148.*

<sup>7</sup> *Infra, No. 1812, 1813.*

<sup>8</sup> *Supra, No. 664, 665 ; infra, No. 904 ; Ætna Ins. Co. v. Tyler, 16 Wend. N. Y. 385, opinion of Walworth, Chan. at p. 401.*

usually inserted in orders of reference at Nisi Prius, and that the submission should be made a rule of court," the assured proposed a reference, to which the underwriters responded by proposing one different from that specified in the policy, to which the assured's counsel replied, that it would be a better form to make the reference a rule of court, and sent a copy of a writ and form of agreement for the purpose, Mr. Chief Justice Best ruled that the condition was satisfied on the part of the assured, and that an action for the loss was maintainable.<sup>1</sup>

SECTION XI. WARRANTIES, CONDITIONS, AND STIPULATIONS IN LIFE POLICIES.

891. *Life policies usually contain sundry conditions, on non-compliance with which they are forfeited; as,*

In case the life shall go beyond certain territorial limits :

Or shall die upon the seas :

Or enter the regular military or naval service :

Or shall die by suicide, or by his own hands :

Or shall die by the hands of justice : <sup>2</sup>

Or in consequence of a duel :

Or if premiums shall not be duly paid :

Or if the written statements of the assured shall be untrue.

892. *The written statements by the assured in reply to interrogatories are usually referred to in the policy as warranties, and so construed.*<sup>3</sup>

893. *The statements of a third party, put in by the assured as constituting, with his own statements, the basis of the contract, and so referred to in the policy, have the character of a warranty of the facts stated; and if the party so referred to by the as-*

<sup>1</sup> Gladstone v. Osborne, 2 Carr. & P. 550. See as to agreements for arbitration, supra, No. 58 and note, also No. 865.

<sup>2</sup> Harper's Adm'r v. Phoenix Ins. Co. 19 Mo. 506. See the forms of the three preceding conditions, 5 Mann. &

G. 647, note at the case of Borradaile v. Hunter cited below.

<sup>3</sup> As to the construction of, and compliance with, representations and express warranties, see supra, No. 866, and references therein, note (4). See also Anderson v. Fitzgerald, 4 Hou. L. Cas. 484; 24 Eng. L. & Eq. 1.

sured, and whose positive statements are thus made a part of the contract, makes a false statement, the policy is void.

As where the person on whose life insurance was effected, by another person, made a false statement of the name of his medical attendant.<sup>1</sup>

Whether any such statement is a warranty to be strictly verified will depend upon the statement itself, upon its being procured by the assured, or with his knowledge or consent, and upon the manner in which it is referred to in the policy, as already mentioned.

894. *A usual inquiry put to the applicant is, whether the proposed life is a good life, or in good health, or is afflicted with any disorder tending to shorten life.*

A subject warranted to be in good health was troubled with spasms and cramps, from violent fits of the gout. Lord Mansfield: "Such a warranty can never mean, that a man has not in him the seeds of some disorder. A man subject to the gout is a life capable of being insured, if he has no sickness at the time, to make it an unequal contract."<sup>2</sup>

This construction seems to have been pretty liberal towards the assured.

A like decision was given where the insured party, having had a paralysis of certain muscles, consequent upon a wound, and causing inconvenience, but not at all affecting his vital functions, was considered not to be afflicted with any disease tending to shorten life.<sup>3</sup>

The warranty that a female was in good health was ruled by Graham, B., to be falsified by her constitution having been radically impaired by intemperance.<sup>4</sup>

An insured party, being warranted free from any disorder tending to shorten life, was affected by dyspepsia; and physicians stated that this disorder, not in excess, did not tend to shorten life. The witnesses did not agree as to the actual state

<sup>1</sup> *Everett v. Desborough*, 5 Bingham 503. See also *Morrison v. Muspratt*, 4 Bingham 60; *Huckman v. Fernie*, 3 Mees. & W. Exch. 505; *Maynard v. Rhode*, 1 Carr. & P. 360; *S. C.* 5 Dowl. & R. 266, cited *supra*, No. 648.

<sup>2</sup> *Willis v. Poole*, Marshall, Ins. 3d ed. 771; 2 Park, Ins. 8th ed. 935.

<sup>3</sup> *Ross v. Bradshaw*, 1 W. Blackst. 312; Park, Ins. 8th ed. 924.

<sup>4</sup> *Aveson v. Kinnaird*, 6 East, 188.

of the subject's health, but the jury gave a verdict in favor of the plaintiff. On a motion for a new trial, Mr. Justice Chambre said: "All disorders have, more or less, a tendency to shorten life, even the most trifling: corns may end in mortification. That is not the meaning of the clause. If dyspepsia were a disorder that tended to shorten life, within this exemption, the lives of half the members of the profession of the law would be uninsurable." Gibbs, C. J.: "According to the rule contended for, the assured, to be insurable, must have no disorder at all."<sup>1</sup>

895. *The condition of forfeiture of a life policy by "suicide," or, as it is more frequently expressed, death of the subject "by his own hands,"*<sup>2</sup> has been elaborately discussed in the English Court of Common Pleas; the question being, whether, in order to bring a case within the condition, the death must be what by the English law is felonious, that is voluntarily incurred by a person capable of crime, and so being a party *felo de se*; or whether no regard is to be had to his capabilities of crime, and the policy is forfeited if he destroys himself, intending so to do.

Insurance being with the exception of the death of the insured party "by his own hands," he voluntarily threw himself from Vauxhall Bridge into the Thames, as the jury at first returned, "with the intention of destroying life," there being "previous to said act no evidence of insanity." Mr. Justice Erskine, before whom the trial was had, not being satisfied with this verdict, because it did not indicate the state of the party's mind "at the time he committed the act," the jury, after retiring, altered their verdict, by finding that "at the time he was not capable of judging between right and wrong;" and Justices Maule, Erskine, and Coltman, being a majority of the court, gave opinions *seriatim*, that the judgment should be rendered for the underwriters on this verdict, on the ground that the object of the condition was to exclude claims in cases where the motive of the assured might be to benefit his family, and that he might be influenced by this motive, though his mind were so disordered as to render him incapable of distinguishing between

<sup>1</sup> *Watson v. Mainwaring*, 4 Taunt. 63.

<sup>2</sup> *Hartman v. Keystone Ins. Co.* 21 Penn. St. 466.



right and wrong. They thought the condition included all acts of intentional self-destruction.

Tindal, C. J., dissented, being of opinion, that, as the condition was the language of the underwriters, and in case of ambiguity, ought to be construed strictly in respect to them, it ought to be limited to cases of felonius, criminal suicide.<sup>1</sup>

Where the party whose life was insured, being at the time subject to insanity, went out in the night to a pond of shoal water, where he was found drowned, his clothes being folded and laid near to the pond, Alexander, C. B., in his instructions to the jury, seems to have recognized the doctrine, that voluntary self-destruction is included in the warranty, for he puts the case upon the distinction, whether the party went to the pond with the intention of bathing and was drowned accidentally, or drowned himself purposely. The jury found for the holder of the policy.<sup>2</sup>

A construction of this condition, similar to that of Tindal, C. J., above cited, has been put upon it in New York, in case of voluntary death by drowning; namely, if the party is insane, it is not a forfeiture.<sup>3</sup> And I take our law to be, that any mental derangement which would be sufficient to exonerate a party from a contract, would render a person incapable of occasioning the forfeiture of a policy under this condition.

If the assured, though insane, understood the nature of the act and intended to take his life the policy is void.<sup>4</sup>

895 a. Under the condition *not to go out of certain territorial limits* without license of the directors, notice and payment of increased premium to the agent and receipt by him are held sufficient license.<sup>5</sup> Where the assured is permitted to travel by sea in "first class decked vessels" he may go in the steerage,<sup>6</sup> but not by a different route from that allowed though equally safe.<sup>7</sup> *Permis-*

<sup>1</sup> *Borradaile v. Hunter*, 5 Mann. & G. 639.

<sup>2</sup> *Garrett v. Barclay*, 5 Mann. & G. 643, n.; and see *Kinnear v. Borradaile*, representing the Rock Life Ins. Co. id. 643.

<sup>3</sup> *Breasted v. Farmers' Loan Society*, 8 N. Y. 299.

<sup>4</sup> *Dean v. American Ins. Co.* 4 All.

Mass. 96. The subject is very fully discussed by Bigelow, C. J., in this case.

<sup>5</sup> *Wing v. Harvey*, 5 De Gex, M. & G. Ch. 265; 27 Eng. L. & Eq. 140.

<sup>6</sup> *Taylor v. Ætna Ins. Co.* 13 Gray, Mass. 434.

<sup>7</sup> *Hathaway v. Trenton Ins. Co.* 11 Cush. Mass. 448.

sion to go out of the limits of the policy for one year, is held to be applicable to any year.<sup>1</sup> Where the life was allowed to be out of specified limits until July 10, he was taken sick June 11, being then six days journey outside, and died July 20; the company was held liable.<sup>2</sup> The "settled limits of the United States" are held to include the overland route to California.<sup>3</sup>

896. Policies often omit the forfeiture by suicide in favor of a creditor.

Accordingly, in case of the assignment of a life policy, issued by the Britannia Life Insurance Company, containing that exception, as collateral security, Wigram, V. C., in the English Court of Chancery, held that an amount insured by the policy not exceeding the assignee's claim was exempted from the condition.<sup>4</sup> It is so held also when the assignment was in trust to secure a bond for provision for the wife of the assured.<sup>5</sup>

The regulations of some life companies authorize their directors, in case of suicide, to pay any amount to the holders of the policy, not exceeding the value of the policy at the time, for surrender.<sup>6</sup>

897. Under the condition that the premium shall be paid within fifteen days after the end of a quarter or year, the forfeiture is not cancelled, and the policy revived, by payment after that time to the agent of the insurers.<sup>7</sup>

A policy upon a party stipulated to pay his widow an annuity, if "he" should pay the quarterly premiums during his life, and all assessments, according to the rules of the society, one of which rules was, that if a member neglected to pay within fifteen days after the quarter-day, he might have the policy revived by payment of all arrearages and a fine within six months, then being in as good health as "when the policy expired." The premium became due on the 20th of December. He died on the 25th, and his representatives tendered the premium on the 27th.

<sup>1</sup> Notman v. Anchor Ass. Co. 4 C. B. N. S. 476.

<sup>2</sup> Baldwin v. New York Ins. Co. 3 Bosw. N. Y. 530.

<sup>3</sup> Casler v. Connecticut Ins. Co. 22 N. Y. 427, Comstock, Davis, and Clerke, JJ., dissenting.

<sup>4</sup> Cook v. Black, 2 Jones, Annuities, 1186.

<sup>5</sup> Moore v. Woolsey, 4 Ell. & B. 243; 28 Eng. L. & Eq. 248.

<sup>6</sup> 5 Mann. & Grang. 648, n.

<sup>7</sup> Acey v. Fernie, 7 Mees. & W. Exch. 151.

Lord Ellenborough and his associates held, that the rule required the payment to be by himself, and that the policy could not be revived by his representatives.<sup>1</sup>

Revival of a policy on condition that the assured is in good health, is held to mean in as good health as at the date of the policy.<sup>2</sup>

The knowingly receiving the premium by the underwriters after it is due is a waiver of objection.<sup>3</sup>

A premium due on Sunday may be paid on Monday.<sup>4</sup>

The rule of a society being that, if the agent shall not give notice to the society of the non-payment of the premium within fifteen days after it is due, he shall be charged with it, the so debiting him will not save the forfeiture of the policy by the non-payment.<sup>5</sup>

898. A condition to name the "usual medical attendant" of a proposed life is violated by omitting one who had prescribed for her and understood her constitution and ailments, and only naming one who had casually recommended something for a cold, on two occasions, so trifling that he had not made any charge.<sup>6</sup>

This condition was ruled by Abbott, C. J., to be violated by only naming a medical attendant who had not attended the party for three years preceding, and omitting to name two who had more recently attended him in severe illness.<sup>7</sup> In this case the forfeiture was put upon the ground of an intent, by the party whose life was insured, to deceive, though he was not himself interested in the insurance.

Where the agent of the underwriters, at the request of the assured, who had an interest in a life, applied to the proposed life for the name of his "usual medical attendant," and he named a physician who had formerly attended him, instead of a quack doctor who had more recently attended him after the "drunken bouts" in which he was in the habit of indulging himself, Best,

<sup>1</sup> Want v. Blunt, 12 East, 183. See also Simpson v. Accidental Ins. Co. 2 C. B. N. s. 257; Pritchard v. Merchants' Ass. Soc. 3 C. B. N. s. 622.

<sup>2</sup> Peacock v. New York Ins. Co. 1 Bosw. N. Y. 338.

<sup>3</sup> Buckbee v. United States Co. 18 Barb. N. Y. 541.

<sup>4</sup> Campbell v. International Ass. Soc. 4 Bosw. N. Y. 298.

<sup>5</sup> Acey v. Fernie, 7 Mees. & W. Exch. 151.

<sup>6</sup> Huckman v. Fernie, 3 Mees. & W. Exch. 505.

<sup>7</sup> Maynard v. Rhode, 1 Carr. & P. 360; S. C. 5 Dowl. & R. 266.

C. J., and his associates of the English Common Pleas, held the policy to be void.<sup>1</sup>

899. It being required to be stated *whether the party* proposed for insurance *had spit blood*, the policy was held to be forfeited by his not mentioning an instance of his spitting blood four years previous, if it was a spitting of blood within the ordinary meaning of the phrase, whatever indication this might be as to his health, the insurers being entitled to be informed of the fact, that they might make their own inferences.<sup>2</sup>

900. An answer that the life is of *temperate habits* is falsified by his having been of intemperate habits, though his health and probability of long life are in no degree affected thereby.<sup>3</sup>

901. In a life policy, made July, 1831, the subject, Colonel Griswold, was warranted "*not to be subject to gout, vertigo, fits,*" &c. It appeared that, in 1827, he had one or two fits of an epileptic character, in consequence of a fall down some stone steps, but had not before or afterwards been subject to any fits. Lord Abinger, instructing the jury, said: "The interpretation I put upon this clause is, not that the party never had a fit, but that he was not, at the time of the insurance being made, a person habitually and constitutionally afflicted with fits."<sup>4</sup>

Insurance without *condition of forfeiture for non-payment of premiums*, is not forfeited thereby.<sup>5</sup> Insurance with the exception of death "by means of insurrection, riot, civil commotion, or military or usurped authority, or by the hands of justice," was held not to include death by resisting a patrol.<sup>6</sup>

902. *Under the condition of forfeiture by reason of untrue statements, the policy, and the premiums paid upon it, are forfeited*, though the untrue statement is honestly made, and is believed to be true by the party making it or answerable for it.<sup>7</sup>

A provision for such *equitable adjustment, in case of forfeiture*,

<sup>1</sup> Everett v. Desborough, 5 Bingh. 503; and see Lindenau v. Desborough, 8 Barnew. & C. 586; S. C. 3 Carr. & P. 353.

<sup>2</sup> Geach v. Ingall, 14 Mees. & W. Exch. 95.

<sup>3</sup> Southcombe v. Merriman, Carr. & M. 286, per Coleridge, J.

<sup>4</sup> Chattock v. Shaw, 1 Mood. & R. 498.

<sup>5</sup> Woodfin v. Asheville Ins. Co. 6 Jones, No. C. 558.

<sup>6</sup> Spruill v. North Car. Ins. Co. 1 Jones, No. C. 126.

<sup>7</sup> Duckett v. Williams, 2 Crompt. & M. Exch. 348.



as may be provided by the directors, entitles the assured only to the benefits of an established rule.<sup>1</sup>

## SECTION XII. STIPULATION FOR SET-OFF.

903. It is a frequent stipulation in policies, and often in the consent to assignments of them, that the underwriters shall have the right to set off demands, for premiums or otherwise, against losses.

A policy being assigned together with the assured ship, and a loss having occurred, the insurers, after the amount of loss had been settled, consented to pay it to the assignees, deducting the premium notes of the assignors held by them, some due before the assignment, others not so. It was held by Oakley, C. J., that, under the statute of New York, relative to set-off generally,<sup>2</sup> the demand for loss, being at the time of the assignment of the policy unliquidated, could not have been a subject of set-off between the original parties to the policy, and accordingly could not be so between the assignees and the underwriters.<sup>3</sup> And consequently the latter were liable to pay the whole amount of the loss, in a suit brought in the names of the parties originally insured, for the benefit of the assignees of the policy.

In Pennsylvania, a demand unliquidated at the time of the assignment, may be set off.<sup>4</sup>

This latter seems to be the rule in England, where it is held, that an underwriter has a right to set off premiums on policies made before the bankruptcy of the assured, against losses occurring after the bankruptcy on policies of date prior to it.<sup>5</sup>

Where the assignment of a policy was assented to by the insurance company, "reserving their rights expressed in the policy," by which it was stipulated to pay any loss in sixty days after proof, "the amount of the premium note, if unpaid, and all

<sup>1</sup> *Nightingale v. State Ins. Co.* 5 R. I. 38. *ica*, 1 Binn. Penn. 429; *Gourdon v. Ins. Co. of North America*, id. 430, n.

<sup>2</sup> Revised Statutes, 278, 2d ed.

<sup>3</sup> *Diehl v. General Mutual Ins. Co.* 498; 2 Marsh. 561; 3 Price, Exch. 227, overruling *Glennie v. Edmunds*, 4

<sup>1</sup> Sandf. N. Y. 257.

<sup>4</sup> *Rousset v. Ins. Co. of North Amer-* Taunt. 775.

<sup>5</sup> *Graham v. Russell*, 5 Maule & S. 498; 2 Marsh. 561; 3 Price, Exch. 227, overruling *Glennie v. Edmunds*, 4 Taunt. 775.

sums due to the company from the insured when such loss becomes due, being first deducted," it was held in Massachusetts, that the company were entitled to set off premium notes given to them by the assignors, in the usual course of the business of insurance by them, subsequently to the date of the assignment, the assignors still remaining solvent.<sup>1</sup> This was a *per curiam* opinion, and not easily reconcilable to the familiar, undisputed, and indisputable doctrine relative to assignment and notice, before stated.<sup>2</sup>

SECTION XIII. WAIVER OF FORFEITURE BY NON-COMPLIANCE  
WITH AN EXPRESS WARRANTY.

904. *The right of the underwriters to insist on a concealment or insufficiency of the assured's answers to inquiries, may be waived by their neglecting to make further inquiries.<sup>3</sup> And their right to insist on a non-compliance with a stipulation for statements and proofs of the loss, may be waived by the silence of the underwriters when the same are presented, or by their refusal to pay the loss on other grounds, after the non-compliance is known to them.<sup>4</sup>*

Where, with a knowledge of an erroneous statement of the distance of other buildings from that insured, the company had subsequently levied and received payment of assessments on the stock note of the assured, this was held to be a waiver of the forfeiture.<sup>5</sup>

But where a policy is forfeited by some act of the assured, as by an assignment after the risk has commenced, an assessment on the stock note of the assured for losses, is not a waiver of the forfeiture.<sup>6</sup>

In case of the answer to the inquiry as to buildings within ten rods, the applicant stated what building was "nearest" on each

<sup>1</sup> *Wiggin v. American Ins. Co.* 18 Pick. Mass. 158. See also *Wiggin v. Suffolk Ins. Co.* id. 145.

<sup>2</sup> *Supra*, No. 81, 106.

<sup>3</sup> *O'Neil v. Buffalo F. Ins. Co.* 3 N. Y. 123.

<sup>4</sup> *Infra*, No. 1800 et seq. Preliminary Proof.

<sup>5</sup> *Frost v. Saratoga County Mut. Ins. Co.* 5 Den. N. Y. 154; *Gates v. Madison County Mut. F. Ins. Co.* 2 N. Y. 43.

<sup>6</sup> *Smith v. Saratoga County Mut. Ins. Co.* 3 Hill, N. Y. 508. See also *Neely v. Onondaga County Mut. Ins. Co.* 7 id. 50.

side, omitting to mention one within that distance further off, it was held, in New York, that, as the answer indicated that the applicant understood the inquiry to relate only to the nearest, and the building omitted was not material to the risk, and the answer seemed rather to imply that there were other buildings within ten rods, the omission by the underwriters to make further inquiry, was a waiver of objection on account of the insufficiency of the answer.<sup>1</sup>

The written statement referred to in a policy on a mill was, "there is one stove" in the building; "the pipe passes through a window at the side; there will, however, be a stove-chimney built, and the pipe will pass into it at the side." The assured afterwards removed the stove to a different part of the building, and carried the pipe through a stone placed in the roof; and on notice of this alteration, the secretary of the insurance company, of whose authority no question is made in the case, indorsed upon the policy, "Consent is given that the within policy remain good, notwithstanding the stove be removed." Edmonds, J., ruled that this was a waiver of the promissory warranty. The verdict being for the assured, a new trial was refused by the Supreme Court in New York, and in the Court of Appeals was granted on different grounds, one ground stated by Cady, J., being that this was not a waiver.<sup>2</sup>

But this latter construction of the indorsement is certainly very questionable, since it should seem that the company could not intend that the building of the stove-chimney should still be insisted upon, when the pipe of the only stove in the mill was permitted to pass through the roof.

A mere verbal consent to waive a forfeiture without any consideration or act done thereupon, has been held not to be binding.<sup>3</sup>

A condition precedent to the attaching of a policy as the countersignature of an agent, may be waived by delivery of

<sup>1</sup> *Gates v. Madison County Mutual F. Ins. Co.* 2 N. Y. 43; *S. C.* 3 Barb. N. Y. 73. *Co.* 16 Ohio, 149. A promise to pay after the loss, the policy having been avoided for breach of condition, is void

<sup>2</sup> *Murdock v. Chenango County Mut. Ins. Co.* 2 N. Y. 210. as without consideration. *Phoenix Ins. Co. v. Lawrence*, 4 Metc. Ky. 9.

<sup>3</sup> *Cockerill v. Cincinnati Mut. Ins.*

the policy :<sup>1</sup> So a condition for prepayment of the premium may be waived by parol.<sup>2</sup>

The receipt of premium after non-compliance with an express stipulation, combined with knowledge of the underwriters, is held to be a waiver of a breach of condition against other insurance,<sup>3</sup> or alienation,<sup>4</sup> or hazardous use,<sup>5</sup> or of a forfeiture of a life policy by going out of limits,<sup>6</sup> of marine insurance by unseaworthiness,<sup>7</sup> or because the premium was not paid at the proper time ;<sup>8</sup> but a mere request to pay the premium, and laying an assessment to cover the loss is not a waiver of forfeiture for non-payment.<sup>9</sup>

Knowledge of other insurance,<sup>10</sup> or previous endorsement of consent,<sup>11</sup> is a waiver of a rule requiring its endorsement, and the knowledge of mortgages is held to be a waiver of warranty against incumbrances.<sup>12</sup>

Receipt of premium by an agent is held not to be a waiver of forfeiture.<sup>13</sup>

But receipt of premium where the underwriters had no knowledge of the forfeiture is not a waiver.<sup>14</sup> Where a policy has been suspended for non-payment, the payment of a subsequent assessment does not waive the suspension.<sup>15</sup>

Assignment of a suspended policy with consent of the under-

<sup>1</sup> *Myers v. Keystone Ins. Co.* 27 Penn. St. 268.

<sup>2</sup> *Trustees, &c. v. Brooklyn Ins. Co.* 19 N. Y. 305. Contra, *Buffum v. Fayette Ins. Co.* 3 All. Mass. 360.

<sup>3</sup> *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328 ; *Barnes v. Union Ins. Co.* 45 N. H. 21.

<sup>4</sup> *Buckley v. Garrett*, 47 Penn. St. 204.

<sup>5</sup> *Keenan v. Dubuque Ins. Co.* 13 Iowa, 375.

<sup>6</sup> *Bevin v. Connecticut Ins. Co.* 23 Conn. 244.

<sup>7</sup> *Hoxie v. Home Ins. Co.* 32 Conn. 21.

<sup>8</sup> *Bouton v. American Ins. Co.* 25 Conn. 542 ; *Lycoming Ins. Co. v. Schollenberger*, 44 Penn. St. 259.

<sup>9</sup> *Brewer v. Chelsea Ins. Co.* 14 Gray, Mass. 203.

<sup>10</sup> *National Ins. Co. v. Crane*, 16 Md. 260. See also *Ins. Co. v. Slockbower*, 26 Penn. St. 199.

<sup>11</sup> *Benedict v. Ocean Ins. Co.* 31 N. Y. 389.

<sup>12</sup> *Bidwell v. North Western Ins. Co.* 24 N. Y. 302. See also *Simpson v. Pennsylvania Ins. Co.* 38 Penn. St. 250.

<sup>13</sup> *Mulrey v. Shawmut Ins. Co.* 4 All. Mass. 116.

<sup>14</sup> *Philbrook v. New England Ins. Co.* 37 Me. 137 ; *Gardiner v. Piscataquis Ins. Co.* 38 Me. 439 ; *Hazard v. Franklin Ins. Co.* 7 R. I. 429.

<sup>15</sup> *Nash v. Union Ins. Co.* 43 Me. 343. But see *Keenan v. Missouri Ins. Co.* 12 Iowa, 126.



writers is held to revive it;<sup>1</sup> but not so, where the policy is absolutely void.<sup>2</sup>

A renewal is held to be a waiver of misrepresentation in the original application.<sup>3</sup>

Parol evidence of consent to non-compliance with an express stipulation, is held inadmissible.<sup>4</sup>

In one case it has been held that a vote to adjust a claim and partial payments, do not constitute a waiver of the forfeiture of the policy.<sup>5</sup>

It is held in Massachusetts that the officers of an insurance company have no power to waive express stipulations of the policy or by-laws,<sup>6</sup> and the knowledge of a misrepresentation of an agent cannot be set up as a waiver of an express warranty.<sup>7</sup>

<sup>1</sup> *Hale v. Union Ins. Co.* 32 N. H. 295.

<sup>2</sup> *Eastman v. Carrol Ins. Co.* 45 Me. 307.

<sup>3</sup> *Rathbone v. City Ins. Co.* 31 Conn. 193; *Liddle v. Market Ins. Co.* 4 Bosw. N. Y. 179.

<sup>4</sup> *Lee v. Howard Ins. Co.* 3 Gray, Mass. 583.

<sup>5</sup> *Murphy v. People's Ins. Co.* 7 All. Mass. 239.

<sup>6</sup> *Evans v. Trimountain Ins. Co.* 9 All. Mass. 329; *Mulrey v. Shawmut Ins. Co.* 4 All. Mass. 116.

<sup>7</sup> *Tebbetts v. Hamilton Ins. Co.* 3 All. Mass. 569. But see *Rathbone v. City Ins. Co.* 31 Conn. 193; *Peoria Ins. Co. v. Hall*, 12 Mich. 202.

## CHAPTER X.

### WHAT RISKS MAY BE INSURED AGAINST.

905. *THE RISKS*, in insurance, are the causes of loss against which the policy is intended to indemnify the assured. It has already appeared, that, in general, persons may be insured against any event, by the happening of which they might sustain a pecuniary damage. But there are some exceptions to this rule, which depend upon the same principles that have been stated respecting insurable interest.

906. *A contract of indemnity against any risk is void, if incurring the risk, or permitting indemnity against it, is in contravention of the provisions or obvious policy of the law, or an infringement upon the rights of persons not parties to the contract.*

A person cannot be insured against the loss which he may incur by violating the law.<sup>1</sup> It is an illegal insurance to insure against the consequences of wrongful acts.<sup>2</sup>

907. *An assured may be indemnified for a loss by an unintentional contravention of a law of the government to which both parties are subject, where he is not at the time affected by notice of the law.*

A ship, owned and insured in New York, got under way in the harbor of that place for her voyage, a few hours before intelligence of the embargo act of 1807, passed three days before, was received there; and, on news of the enactment of the law, was, before getting out of the port, seized for the violation of it. The assured abandoned, and it was adjudged that he was entitled to recover for a total loss.<sup>3</sup>

<sup>1</sup> Johnston v. Sutton, Dougl. 241.

<sup>2</sup> Delanoy v. Robson, 5 Taunt. 605.

See Dalmada v. Motteux, Park, Ins. 8th

ed. 504; Cohen v. Hinckley, 1 Taunt.

249; Gray v. Sims, 3 Wash. C. C. 276.

And supra, see c. 3, s. 2. Liquor ille-

gally kept for sale may be insured;

Niagara F. Ins. Co. v. De Graff, 12

Mich. 124.

<sup>3</sup> Walden v. Phoenix Ins. Co. 5 Johns.

N. Y. 310.

The equity of the rule adopted by the court is obvious, though it is not consistent with the doctrine held in England and the United States, that a law is binding throughout the country immediately on its being enacted, unless it is otherwise provided, though citizens at a distance from the seat of government cannot possibly have immediate notice of it.<sup>1</sup>

908. *A person may be insured against the consequences of violating the regulations of trade and the municipal laws of a foreign state.*<sup>2</sup>

If the vessel or cargo be seized and condemned in a foreign country, for violating their revenue laws, the insurers will be liable to pay this loss, provided it appears by the policy, and the course of trade, that this was one of the risks contemplated by the parties.<sup>3</sup>

909. Though the goods of a neutral employed in a *contraband trade* are subject to a seizure and confiscation by a belligerent, yet the trade *is not considered to be illegal*<sup>4</sup> on the part of the neutral, and the risk of seizure as contraband may, accordingly, be legally insured against.<sup>5</sup>

The treaty between Great Britain and Portugal contains a stipulation against trade in articles contraband of war, enumerating them. This treaty was construed to apply only to trade during a war in which one of the parties to the treaty might be engaged.<sup>6</sup>

910. *A valid contract may be made for the purpose of indemnifying the assured against the administration of the laws of nations by a foreign tribunal.*

It has at times been a common practice, in some parts of the United States, to insert a provision in a policy containing a warranty of neutral property, that proof of the property being neutral should be "made only in the United States." The construction put upon this provision was, that the parties to the policy should

<sup>1</sup> As to promulgation of laws, see 1 Kent's Com. 3d ed. 458.

<sup>2</sup> Supra, No. 268.

<sup>3</sup> Valin, tit. 2, p. 130, says, that to trade in foreign countries, in violation of their laws, is regarded as an ingenious and laudable species of address.

<sup>4</sup> Supra, No. 282.

<sup>5</sup> The Santissima Trinidad, 7 Wheat. 283. See also Gray v. Sims, 3 Wash. C. C. 276.

<sup>6</sup> Wilbraham v. Wartnaby, 1 Lloyd, & W. 144.

not be affected by any judgment given by a foreign tribunal respecting the neutral character of the property, but the question should still be left open to be considered by the courts of the United States. No question has ever been made as to the legality and validity of such an agreement.

911. *A person cannot protect himself by insurance against the loss occasioned by his own fraudulent acts and misconduct.*

A policy being made against "all risks," the court said it applied "to all losses, except such as arise from the fraud of the assured. This limitation is proper, for it cannot be supposed that the plaintiff was to be insured against his own fraudulent acts."<sup>1</sup>

912. Upon the question, whether *the members of a mutual insurance company can bind themselves to indemnify each other for the loss that any one may incur by his own vessel's running down another*, the English Court of Common Pleas said, the assured are also "insurers, and are as much interested to extend the principle of loss as to restrain it;" and the insurance against this risk was accordingly held to be valid.<sup>2</sup> But the court intimates, by giving this reason, that if the contract necessarily made it for the interest of the assured to incur damage, it would for this cause be void.

913. *A citizen may be insured against an arrest or detention by his own government, not occasioned by his contravention of law.*

A question was first raised on this proposition in a case where both contracting parties were subjects of the same government. A vessel insured was seized by government and converted into a fire-ship. Chief Justice Holt was inclined to the opinion, that the insurers were liable, but the case being referred, the point was not decided.<sup>3</sup>

Lord Ellenborough said, that, where the assured was a British subject, he might recover against a British underwriter for a loss sustained by an act of their own government; "that being totally different from the case of a foreign assured; for amongst our own subjects, whether the plaintiff or defendant sustain the

<sup>1</sup> *Goix v. Knox*, 1 Johns. Cas. N. Y. 337; and see *Earl v. Shaw*, id. 313; *Simeon v. Bazett*, 2 Maule & S. 94.

<sup>2</sup> *Delanoy v. Robson*, 5 Taunt. 605.

<sup>3</sup> *Anon.* 2 Salk. 444; 2 Ld. Raym.

840.



loss, it cannot prejudice the interests of the country."<sup>1</sup> The same principle is adopted in the United States.<sup>2</sup>

In the case of a policy on an American ship from New York to Wilmington, North Carolina, and thence to Dublin, which sailed on the voyage to Wilmington, but was detained by an embargo before she got to sea from that place, Chief Justice Kent, giving the opinion of the court, said: "It is a very forced argument to liken this case to a contract to do an unlawful act, or to perform an illegal voyage. The voyage commenced before the law existed. It is not the object of the policy to violate any law. It was an indemnity against arrests and detentions, not a resistance of them. Where both parties belong to the same government, the act of the government is as much the act of one party as of the other, and each ought to be equally estopped from taking advantage of it to the prejudice of the other."<sup>3</sup>

Insurance was made in New York on the "British brig Francis," from Middletown, Connecticut, to the West Indies, &c. The assured, the owner of the ship, was a British subject. The ship was seized off Antigua by a British ship of war, and carried into that island, and there condemned by a British vice-admiralty court, on account of an alleged violation of the British navigation acts. On the loss being claimed, it was objected on the part of the underwriters, that the acts of the naval and judicial officers of the British government in seizing and condemning the ship, must be imputed to the assured. Mr. Justice Sutherland, in giving the opinion of the court, said: "It is contended that the assured, being a British subject, and his vessel having been condemned by a British court, cannot recover for an act done by or under the authority of his own state. There is a class of cases which holds this doctrine, in relation to the legislative acts of a government, but no case has been furnished by the counsel, and none has been found by the court, in which the principle has been extended to the decisions of the courts of justice."<sup>4</sup>

The opinion of the court accordingly was, that the assured might be indemnified against such a loss.

<sup>1</sup> *Page v. Thompson, Park, Ins.* 130, n. N. Y. 299. See also *Walden v. Phœ-*

<sup>2</sup> *Delano v. Bedford Mar. Ins. Co.* 10 Mass. 347; *Odlin v. Ins. Co. of Penn-* *nix Ins. Co.* id. 310; *Ogden v. N. Y.*  
*sylvanïa,* 2 Wash. C. C. 312. *Firemen's Ins. Co.* 10 id. 177.

<sup>4</sup> *Francis v. Ocean Ins. Co.* 6 Cow.

<sup>3</sup> *McBride v. Marine Ins. Co.* 5 Johns. 404.

914. *A foreign assured is indemnified, under a policy in the common form, against the acts of his own government, that are not hostile to that of the underwriter.*

The contrary was held in a case where some Americans, being neutrals, shipped property for a voyage from the United States to Liverpool, which was insured in England on account of the shippers. A vessel belonging to the American consul at Liverpool was insured there at about the same time. After the risks had commenced under these policies, the vessel and cargoes insured were detained in the American ports by the embargo of 1807. Losses being claimed on this account, Lord Ellenborough, who gave the opinion of the court, said: "In all questions arising between the subjects of different states, each is a party to the public authoritative acts of his own government; and, on that account, a foreign subject is as much incapacitated from making the consequences of an act of his own state the foundation of a claim against a British subject, in a British court of justice, as he would be if such an act had been done immediately and individually by such foreign subject himself." <sup>1</sup>

But in a later case, the opinion of the same court, given by the same judge, does not confirm this doctrine. A ship and cargo belonging to Prussian subjects, residing at Colburg, being insured in England, were seized and confiscated by the Prussian government, under the Berlin decree. The insurers, in defence against a claim for the loss, assumed the ground upon which the court had decided the above cases. Lord Ellenborough said: "There is no doubt that an insurance upon an American ship, against an American embargo, might be good; for not only an insurance against the acts of the assured's own government, but even against his own acts, might be good, if the underwriter was disposed to enter into so hazardous a risk." He goes on to say, that the underwriters in the above cases did not intend to insure against the acts of the American government. "As the perils occasioned by the acts of the party's own government are held to be excluded, on the reason of the thing, so they may be held to be included whenever the reason of the thing requires it." And judgment

<sup>1</sup> *Conway v. Davidson*, 10 East, 536; *Same v. Forbes*, id. 539; *Maury v. Shedden*, id. 540.

was given for the assured.<sup>1</sup> But it is not said that there was any difference between the policies, or any other circumstance to distinguish the cases; the latter decision, therefore, seems to overrule the former.

Chief Justice Kent, speaking of this notion, that the act of the government is that of its subjects, says it is "too fanciful" to be entitled to any weight.<sup>2</sup>

915. *An insurer cannot bind himself to indemnify a foreigner against the hostile acts of the insurer's government.*

In Lord Mansfield's time, as we have seen, an alien enemy recovered, in some instances, of British underwriters for losses by British captures.<sup>3</sup> But such a claim could not now be enforced, and it was never fully and distinctly recognized to be legal.<sup>4</sup>

916. *A neutral may be protected, under a policy made in a belligerent country, against arrest by the officers of such country, on groundless suspicion of the subject insured being enemy property.*

An American ship, the *Hannah*, was insured in England, on a voyage from New York to Havre, in the course of which she was arrested by a British cruiser, and carried into Bristol, to ascertain whether she had French property on board; there being a war at the time between England and France. The loss occasioned by this detention was claimed of the underwriters, who objected that they could not bind themselves to indemnify a neutral for losses consequent upon this detention by their own government. Lord Ellenborough said, in giving the opinion of the court, that an "American was at liberty to pursue his commerce with France, and to be the carrier of goods for French subjects. The indemnity sought in this case is not an indemnity to an enemy, or to a neutral forfeiting his neutrality by an act hostilely done by him against the interests of Great Britain, but an indemnity to a

<sup>1</sup> *Simeon v. Bazett*, 2 Maule & S. 94.

<sup>2</sup> *Walden v. Phœnix Ins. Co.* 5 Johns. N. Y. 310.

<sup>3</sup> *Thellusson v. Fergusson*, Dougl. 346; *Eden v. Parkinson*, id. 732.

<sup>4</sup> *Supra*, c. 3, s. 2; *Eden v. Parkinson*, Dougl. 732; *Thellusson v. Fergus-*

*son*, id. 346. See also *Plantamour v. Staples*, 1 Term, 611, n.; 3 Dougl. 1; *Gamba v. Le Mesurier*, 4 East, 407; *Kellner v. Le Mesurier*, 4 id. 396. This case is commented upon, 7 East, 451. *Touteng v. Hubbard*, 3 Bos. & P. 291; *Glaser v. Cowie*, 1 Maule & S. 52, where *Lubbock v. Potts*, 7 East, 449, is cited.

neutral, as such, against the consequences of an act innocently and allowably done by him, in the exercise of his own neutral rights, and as innocently and allowably, to a certain degree, controlled and interrupted on our part, in the exercise of our rights as belligerents." And on this ground, that the detention was not of a hostile character, judgment was given in favor of the assured.<sup>1</sup>

917. *An officer of a vessel may be insured against the barratry of the other officers, or the master or men.*<sup>2</sup>

917 a. The risk in bottomry may be for as many voyages or passages as are, bonâ fide, in contemplation by the parties.<sup>3</sup>

A life policy covering the risk of suicide is not illegal as encouraging suicide.<sup>4</sup> A policy against fire and other risks which are illegal is good against fire.<sup>5</sup>

<sup>1</sup> *Barker v. Blakes*, 9 East, 283. See also *Visger v. Prescott*, 5 Esp. 184; *Kellner v. Le Mesurier*, 4 East, 396.

<sup>2</sup> *Stone v. National Ins. Co.* 19 Pick. Mass. 34.

<sup>3</sup> *The Mary*, 4 Notes of Cas. 376.

<sup>4</sup> *Moore v. Woolsey*, 4 Ell. & B. 243; 28 Eng. L. & Eq. 248.

<sup>5</sup> *Mobile Ins. Co. v. McMillan*, 31 Ala. N. S. 711.



## CHAPTER XI.

### THE VOYAGE. DURATION OF THE RISK.

SECT. 1. At what time or place the risk begins.		SECT. 2. Termination of the risk. 3. Suspension of the risk.
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#### SECTION I. AT WHAT TIME OR PLACE THE RISK BEGINS.

918. SINCE the underwriters are liable only for losses arising from the perils insured against, and within the time for which the risk is to continue, *the policy must specify what risks the insurers assume, when those risks commence, and for what period they are to continue*, or by what event they are to be terminated.

Some marine ordinances contain regulations in respect to the time when the risk on the ship or goods shall begin and end.<sup>1</sup> But there is no positive regulation by law on this subject in Great Britain or the United States, nor does it appear that any such is necessary.

"The risk is to be described with suitable and convenient certainty. When the insurance is for a term of time, the termini are the day and hour when the insurance commences and terminates. When the insurance is on a particular voyage, there is generally no reference to any time. The termini are to be expressed in the policy, and if left in uncertainty by any omission or blank, the policy is void."<sup>2</sup>

Under an open, running policy upon shipments on vessels on the western waters or from the Atlantic ports by way of New Orleans, for six months, "indorsements to be evidence of property at the risk of the underwriters," the assured received advice of a shipment and loss at the same time, which he proposed to indorse. Justices Topkins, Napton, and Scott held, that the risk

<sup>1</sup> Code de Commerce, l. 2, tit. 10, n. 152.

<sup>2</sup> Per Sewall, J., *Manly v. United M. & F. Ins. Co.* 9 Mass. 85.

did not begin at all, on the ground that the policy could not attach by indorsements made after notice of loss.<sup>1</sup>

If a ship is insured, says Molloy, "from London to ——," the risk will not attach for want of a sufficient description when it is to end;<sup>2</sup> but the port of departure not being specified, the omission may be supplied by evidence of the port where the vessel was when the policy was made, and from which she sailed on the voyage described.<sup>3</sup>

But courts do not require a very minute accuracy in the description of the risk; and it is, in general, sufficient, if the intention of the parties, in respect to the commencement and end of the risk, can be satisfactorily gathered from the policy, and any incidental error or inconsistency, in immaterial circumstances, will not defeat the contract.

919. *There can be no risk until the assured has an interest in the insured subject.*

Accordingly, if the policy is on a vessel at a certain place, which the assured had purchased there, the insurance can take effect only from the time of the purchase.<sup>4</sup>

920. We have already seen that *the risk does not commence*, the policy being void, *in case of concealment* of material facts, or *non-fulfilment of a representation or warranty* requiring fulfilment at the outset.<sup>5</sup>

921. *If the risk is described to commence "on" a certain day, it extends to all losses happening during any part of the day: but a question has occurred upon the construction of a policy "from" a certain day.*

The life of Sir Robert Howard was insured by a policy dated on the 3d of September, "for one year from the date" thereof. He died on the 3d of September following. Chief Justice Holt instructed the jury, that " 'from the day of the date' excludes the day, but 'from the date' includes it."<sup>6</sup>

Whether the expression, "from the day of the date," excludes

<sup>1</sup> Edwards v. St. Louis Perpetual Ins. Co. 7 Mo. 382. Cas. N. Y. 269; and see Seamans v. Loring, 1 Mas. C. C. 128.

<sup>2</sup> Book 2, c. 7, s. 14.

<sup>5</sup> Supra, No. 676, 677, 764.

<sup>3</sup> Folsom v. Merchants' Ins. Co. 38 Me. 414.

<sup>6</sup> Sir Robert Howard's Case, 2 Salk. 625.

<sup>4</sup> Steinback v. Rhineland, 3 Johns.

that day, was afterwards very elaborately considered by Lord Mansfield, who examined all the previous authorities on the subject, which he said were "so many contradictions backwards and forwards." He came to the same conclusion which Lord Hardwicke had come to, that "the construction must always depend upon the subject-matter."

It was held that "from the date," and "from the day of the date," mean the same thing.<sup>1</sup>

In life and fire policies, and marine time policies, the risk is usually specified to begin at a certain hour of a certain day.

922. *A policy takes effect in relation to the day of its date though not delivered until afterwards.*<sup>2</sup>

923. *Insurance for goods for a certain voyage on board of a certain vessel, is presumed to be for the next such voyage she makes, and will not apply to an ulterior one, unless this presumption is rebutted.*

Insurance being on 143 hogsheads of sugar, and all lawful goods on the steamer B., at and from New Orleans to Louisville, was held, in Louisiana, to attach only to the twenty-six hogsheads taken on the next trip of the boat, and not to those subsequently taken.<sup>3</sup>

924. *Postponing the risk by making a compulsory intermediate passage does not prevent its attaching, if the voyage is pursued without unnecessary delay :*

As where, in case of insurance on freight from Saffi to Lisbon, with notice that the vessel had to make two prior passages, the crew, being afraid of Moorish cruisers off Saffi, refused to sail thither, and compelled the master to make an intermediate passage to Lisbon.<sup>4</sup>

925. *The risk may be assumed by the underwriters for an anterior period, and cover losses prior to the date of the policy, provided there is no concealment or misrepresentation by either party.*<sup>5</sup>

<sup>1</sup> Pugh v. Leeds, Cowp. 714.

<sup>4</sup> Driscoll v. Passmore, 1 Bos. & P.

<sup>2</sup> Lightbody v. North American Ins. Co. 23 Wend. N. Y. 18; Philadelphia Ins. Co. v. American Ins. Co. 23 Penn. St. 65.

200.

<sup>3</sup> Courtney v. Miss. F. & Mar. Ins. Co. 12 La. 233.

<sup>5</sup> Barr v. Gibson, 5 Mees. & W. Exch. 390; Hallock v. Commercial Ins. Co. 2 Dutch, N. J. 268; Commercial Ins. Co. v. Hallock, 3 id. 645.

For this purpose the clause "lost or not lost" is introduced. But this clause is not necessary; it is sufficient if it appear by the description of the risk, and the subject of the contract, that the policy is intended to cover previous losses.

A wager being made in the terms following: "I promise to pay the Earl of March 500 guineas if my father dies before Sir W. Codrington;" signed by William Pigot; a corresponding promise being made to Mr. Pigot by the Earl of March; it appeared that Mr. Pigot's father was dead at the time of making the wager. Lord Mansfield said: "It was not known that the father of either of them was then dead. Their lives, their healths, were neither warranted nor excepted. It was equal to both of them whether one of their fathers should be then sick or dead. That the event had happened was in the contemplation of neither party. The nature of such a contract, and the manifest intention of the parties, support the verdict of the jury," who applied the contract to the previous event.<sup>1</sup>

Insurance was made in June, 1825, "lost or not lost, upon the ship Tarquin, now on a whaling voyage in the Pacific Ocean, during her stay there and until her return to Nantucket; beginning the adventure upon said cargo as aforesaid, and to continue during the voyage aforesaid, until landed." The Tarquin had sailed on the voyage in January, 1822. One question was, when the risk commenced on the oil taken, no question being made as to the outfits. Shaw, C. J., giving the opinion of the court, said: "To construe this policy, according to the argument of the defendants, so as to make the risk commence on the day of its date, it would be necessary to limit the word 'voyage' to a very small part of the voyage, and render the words 'lost or not lost' wholly inoperative. The word 'now,' we take to be merely descriptive, and designed to identify the voyage. We are of opinion that the policy would attach upon the oil, from the time the vessel first began to take whales in the course of this voyage."<sup>2</sup>

926. *Where a previous loss is known to both parties it is no ground of objection to the policy.*<sup>3</sup>

<sup>1</sup> Earl of March v. Pigot, 5 Burr. 2802. See also Thompson v. Donaldson, 3 Esp. 63.

<sup>2</sup> Paddock v. Franklin Ins. Co. 11 Pick. Mass. 227.

<sup>3</sup> Mead v. Davison, 3 Ad. & E. 303.



Where the amount of the loss is not known, or that of salvage in total loss, there is no reason why indemnity may not be agreed upon, any more than where the loss itself is not known.

927. Under a policy on a vessel against sea-perils "at" a place, as distinct from a voyage, the risk commences when the vessel is at the place in reasonable safety;<sup>1</sup> and on the goods from the time of their being exposed to sea-perils within the conditions of the policy in respect of the vehicle and custody in which they are.

928. *The risk is sometimes described to be at and from certain ports, for the purpose of specifying what navigation and voyages are intended, and not for marking the commencement of the risk.*

A policy was made on a ship, "to, at, and from one or more ports on the globe, for one year, commencing the risk at Barbadoes on the 7th of December, at twelve o'clock at noon, to continue till the vessel should be arrived and moored at anchor twenty-four hours in safety, within the year aforesaid." The vessel was not at Barbadoes, as was supposed in the policy, but the court said her being so was immaterial, and that the risk would end with the year, without any regard to her being in any port at that time or before; the beginning, duration, and end of the risk being well enough described, without any regard to the place where it was to commence, or to the vessel's being safe in port, as it appeared by the policy that those facts were not intended to be warranties.<sup>2</sup>

The brig Helen was insured "at and from Calais, Maine, on the 16th day of July, to, at, and from all ports and places to which she might proceed in the coasting business, for six months." The brig was not at Calais on the 16th of July, though she was there subsequently, during the six months. Neither of the parties to the policy knew where she was at that time. The Supreme Court of Massachusetts held that the risk attached, for "it was the clear intent of the parties to insure on time, without regard to the place where the vessel might then be, but with regard to the employment in which the vessel was engaged, namely, the coasting trade."<sup>3</sup>

<sup>1</sup> Vide supra, No. 720, et seq.

<sup>3</sup> Martin v. Fishing Ins. Co. 20 Pick.

<sup>2</sup> Manly v. United Mar. & F. Ins. Mass. 389.

Co. 9 Mass. 85.

A policy "on a cargo of salt and proceeds, at and from Rio to Santos and two other ports, and at and from either to a port of discharge in the West Indies, Europe, or the United States, until safely landed," was held by Mr. Justice Cranch, to attach at Rio on a cargo which had been laden at Cadiz.<sup>1</sup>

Where a prior policy on time, covering the value of the ship, has a short time to run, and a subsequent policy is made for one year, at and from B. to C., containing the clause as to prior insurance, "whether for the whole voyage, or from one port of loading or discharge to another," and the ship sails from B. before the prior policy expires, the risk on the second policy will commence on the ship at sea, at the expiration of the prior policy.<sup>2</sup>

Goods insured from Amelia Island, being by well known usage taken in at Tygre Island, which is a neighboring one, the risk was ruled to have commenced at the latter.<sup>3</sup>

929. *A risk described to commence at a "port" of lading of a certain coast or district which has only open roadsteads, will commence at such a lading place :*

As from a "port of lading in Yucatan."<sup>4</sup>

930. *Though the vessel sails from the place at which the risk is to commence, yet if she does not sail on the voyage insured, the policy will not attach.*

In case of insurance on freight "at and from Demerara, Berbice, and the Windward and Leeward Islands, to London," the vessel, under a verbal agreement, took a cargo at Demerara to be delivered at Berbice; another being to be taken there for London, each at the usual freight. It was held by the English Court of Common Pleas, that a loss on the passage to Berbice was not covered, the voyage for which the freight was insured not having commenced.<sup>5</sup>

931. *Insurance at or from a port can commence only at such port, and such places as are comprehended as part of it, or at a place at which, by usage, goods insured from the place named are loaded.*

<sup>1</sup> Gardner v. Columbian Ins. Co. of Alexandria, 2 Cranch, C. C. 473.

<sup>3</sup> Moxon v. Atkyns, 3 Campb. 200.

<sup>2</sup> Kent v. Manuf. Ins. Co. 18 Pick. Mass. 19.

<sup>4</sup> Delonguemere v. N. Y. Firemen's Ins. Co. 10 Johns. N. Y. 120.

<sup>5</sup> Sellar v. M'Vicar, 4 Bos. & P. 23.

Goods, being insured "at and from Gibraltar to Dublin," were shipped at Malaga, and the vessel did not put into Gibraltar. Chief Justice Gibbs, and the other justices of the English Common Pleas, held that the policy did not attach.<sup>1</sup>

A policy was made on goods "at and from Caermarthen to London." The goods were in fact taken in at Llanelly, which is a member of the port of Caermarthen, but having a distinct custom-house. Caermarthen lies farther up the river, and is accessible only by an intricate navigation, and few ships clear there, except the coasting vessels belonging to the place. Yet the court decided that the risk run was different from that described in the policy, one terminus of which was Caermarthen.<sup>2</sup>

Under a policy on flour, "at and from Lyme to London," the flour was shipped at Bridport Harbor, which is a member of the port of Lyme, and lies about nine miles eastward of Lyme, and nearer to London, and a vessel bound from Lyme to London must pass Bridport. The court said, if the assured could have proved a usage for ships to load at Bridport, upon a policy at and from Lyme, it might have assisted him, but the whole was probably a mistake, the parties supposing the ship would sail from Lyme. Judgment was given in favor of the underwriters.<sup>3</sup>

A similar decision has been given in New York, in a case where the actual risk was strictly a part of that described. The policy was on ship and freight on a voyage "at and from Calcutta to New York, with liberty to touch at Madras, for trade and to take in a part of a cargo." The vessel did not go to Calcutta, but took in the whole cargo at Madras. Mr. Justice Thompson, giving the opinion of the court, said: "It is impossible to say that a voyage from Madras to New York, is the same as a voyage from Calcutta to New York. The adventure is to begin at and from Calcutta. I should not think it competent for the assured to select at pleasure any point of the iter, and say the voyage insured shall commence there."<sup>4</sup>

An order for insurance on cargo stated that the vessel when last heard from was on the passage from San Blas to St. Andreas,

<sup>1</sup> Park v. Hammond, 2 Marsh. 189;

<sup>3</sup> Constable v. Noble, 2 Taunt. 403.

6 Taunt. 495; 1 Holt, 80; 4 Campb. 344.

<sup>4</sup> Murray v. Columbian Ins. Co. 4 Johns. N. Y. 443.

<sup>2</sup> Payne v. Hutchinson, 2 Taunt. 405, n.

and a policy was thereupon made "as per order, at and from St. Andreas, with liberty of two ports on the Spanish Main, and at and from any of them to Baltimore." The vessel was wrecked shortly after leaving San Blas, while on the common route to both St. Andreas and Baltimore, before turning off to the former. The assured proposed to take San Blas for the terminus a quo, and claimed for the loss on the ground that the risk had commenced, and that his claim was not prejudiced by a mere intention to deviate. But the court in Maryland decided, that the risk could commence only at St. Andreas, and accordingly had not commenced.<sup>1</sup>

932. *In insurance on a vessel "at" a port, the risk generally commences from the time of its being there.*

It has been held in one case, on a policy on a ship "at and from Cape St. François," that "the risk commenced after she had been safely moored twenty-four hours at that port."<sup>2</sup> But Lord Hardwicke was of opinion, that in such case the risk commenced immediately on the arrival at the port.<sup>3</sup> And conformably to this opinion it has been decided in New York, Mr. Justice Kent giving the opinion of the court, that "'at and from,' when applied to the ship, includes the period of her stay in the port, from the time of her arrival there."<sup>4</sup>

933. *Under a policy at and from a place, a question concerning the commencement of the risk sometimes arises, from the extent of the place named.*

A policy at and from Jamaica, is held to attach at any port of the island, and to protect the property from port to port in the island.<sup>5</sup>

It is a matter of doubt, in some cases, when a vessel is to be considered to be *at* a place. A vessel being insured "at and from Limerick," it was held that the risk began while the vessel lay at Grass Island, nine miles below the town of Limerick, but within what is considered to be the port of that place.<sup>6</sup>

<sup>1</sup> Maryland Ins. Co. v. Bossiere, 9 Gill & J. Md. 121.

<sup>2</sup> Garrigues v. Coxe, 1 Binn. Penn. 592.

<sup>3</sup> 1 Atk. Ch. 548.

<sup>4</sup> Patrick v. Ludlow, 3 Johns. Cas. N. Y. 10.

<sup>5</sup> Cruikshank v. Janson, 2 Taunt. 301.

<sup>6</sup> Bell v. Marine Ins. Co. 8 Serg. & R. Penn. 98.



Insurance being made on the freight of a vessel to, and during her stay at, the "port or ports of discharge and loading in India and the East India Islands," and thence to Europe, the vessel took in her homeward cargo at the island of Mauritius, which is classed as an African island by the geographers, and also by the inhabitants of the island. But evidence was admitted to show that, in mercantile language, it was considered as an East India island; and it was left to the jury to say whether it was so to be considered, who found for the assured.<sup>1</sup>

Insurance was made on goods "at and from Singapore, Penang, Malacca, and Batavia, to a port of discharge in Europe, with leave to touch, stay, and trade at any ports and places whatsoever and wheresoever in the East Indies," &c. The ship sailed from Batavia, about four hundred miles to the eastward, to Sourabaya, and not in the course of any of the places specifically named in the policy, or to Europe, and there took in a part of a cargo, and returned to Batavia to complete her loading. It was held, that the risk commenced at Sourabaya, on the goods put on board there.<sup>2</sup>

934. *Under a policy on a ship "at and from" a foreign port, the risk is held not to commence till she is there in safety.*

Lord Ellenborough says: "The safety required to give a good commencement to the risk on the ship, is a physical safety from the perils insured against, and not a freedom from political danger."<sup>3</sup>

A policy being made on a ship and freight at and from St. Michael's the vessel arrived there leaky, and not fit to take in a cargo, and a storm which she had met with during the voyage, continuing after she came to anchor, she was driven out to sea again and wrecked, after having been at anchor more than twenty-four hours. It was ruled by Lord Ellenborough that the risk had not commenced.<sup>4</sup>

935. *Where the insurance at and from a place for a specified voyage is on a ship lying in the port, the commencement of the risk may depend upon that of the preparations for the voyage.*

<sup>1</sup> Robertson v. Money, 1 Ry. & M. 75.

<sup>3</sup> Bell v. Bell, 2 Campb. 475.

<sup>4</sup> Parmeter v. Cousins, 2 Campb.

<sup>2</sup> Hunter v. Leathly, 1 Lloyd & W. 235.

Cas. 244; Leathly v. Hunter, 7 Bingham 517.

In the case of insurance made on a ship and cargo "at and from Bergen, in Norway, to Boston," at Providence, in Rhode Island, on the 7th of February, 1814, the vessel had arrived at Bergen in March 1813, as prize to an American privateer. The vessel and cargo were not transferred to the assured, in such form as to give him an insurable interest in them, until October, 1814; and then all thoughts of the voyage to Boston were laid aside, and he proposed to send the vessel to France, but afterwards changed his mind, and concluded to send it to the United States, on which voyage she sailed in June, 1815, and arrived in Boston in August following. As to the commencement of the risk under the policy, if it commenced at all, and the construction of the words "at and from," Mr. Justice Story says: "If the vessel has been a long time in port, without reference to any particular voyage, the policy will attach only from the time that preparations are begun to be made with reference to the voyage insured. And if the party insured acquired the ownership subsequent to such time, and before the date of his policy, then the policy will attach only from the time of acquiring such ownership." And the court ruled, that, as the delay of the voyage was not justified, the underwriters could not be held, and "that, as to them, there was a complete non-inception of the voyage insured." <sup>1</sup>

A ship and freight were insured "at and from Pernambuco or any other port or ports in the Brazils, to London; beginning the adventure upon the said ship on the termination of her cruise, and preparing for her voyage to London." The ship, having given up cruising, went to Pernambuco to procure a cargo, but not being able to procure one there, proceeded to St. Salvador, and a loss happened before her arrival at the latter port. A question was made whether the risk had commenced at Pernambuco. Chief Justice Gibbs said: "The object of the policy must have been to secure the assured from all risks from the time the cruise ended. It has been objected, that, though the cruise had ended, the ship was not preparing for her voyage. I think that, having come to Pernambuco to procure a cargo, and having sent an officer on shore for that purpose, she must be

<sup>1</sup> *Seamans v. Loring*, 1 Mas. C. C. 128. See also *Grant v. King*, 4 Esp. 175.

considered as preparing for the voyage within the words of the policy, and that therefore the policy had attached.”<sup>1</sup>

So, where a policy was made on the 3d of September, at New York, on a vessel “at and from Guadaloupe to St. Thomas’s,” and at the time of subscribing the underwriter was informed that the vessel was at Guadaloupe on the 28th of July, where she had in fact been for a long time before; the court said, that, “in a case like this, the risk does not commence till some act be done towards equipping for the voyage, or on the day on which she is stated, as here, to have been in safety at the port from which she was to sail.”<sup>2</sup>

But if the ship needs repairs merely, the risk will commence notwithstanding this circumstance.<sup>3</sup> The repairs must, however, be made within reasonable time, and if there is any unnecessary and unreasonable delay the policy will no doubt be forfeited, on the ground of a deviation or enhancement of the risk. So, if all preparation for the voyage be suspended, the risk will cease.<sup>4</sup>

936. *Under a policy for a voyage from a certain place, the risk will commence if the vessel sails for that place on the same voyage, though with an intention to deviate in the course of the voyage :*

As where, the cargo being insured from Liverpool to London, the vessel sailed with an intention to put into Southampton.<sup>5</sup>

937. *But though the ship sails from the specified port, if she sails on a different voyage, and for a different port of destination, the risk will not commence.*<sup>6</sup>

A vessel, being insured “at and from Cadiz to a port of discharge in St. George’s Channel,” was driven on shore and lost at Cadiz, before the cargo of fish which she had brought thither was wholly unloaded, and, accordingly, before any preparation had been made for the voyage insured. Before she was lost, the agents of the assured had decided to despatch the vessel directly for Newfoundland with a cargo of salt from Cadiz, instead of

<sup>1</sup> Lambert v. Liddard, 1 Marsh, 149 ;  
<sup>5</sup> Taunt. 480.

<sup>2</sup> Kemble v. Bowne, 1 Caines, N. Y.  
75.

<sup>3</sup> Motteux v. London Ass. Co. 1 Atk.  
Ch. 545.

<sup>4</sup> Chitty v. Selwyn, 2 Atk. Ch. 359.

<sup>5</sup> Hare v. Travis, 7 Barnew. & C. 14.

<sup>6</sup> Hare v. Travis, 7 Barnew. & C. 14.

sending her to Liverpool for such a cargo, fearing that the delay would make her too late for the season; and had so advised the owners at Glasgow a week before the loss happened. The decision was in favor of the claim for the loss in three courts successively in Scotland, which was reversed in the House of Lords. The ground upon which Lord Chancellor Eldon put the final decision was, that the insured voyage to Liverpool had been given up.<sup>1</sup>

But this ground does not seem to be sufficient; it required that the risk should not have commenced, and that the assured might have recovered back his premium, or that the underwriters had been discharged by the delay to proceed to Liverpool; and the circumstances seem to have justified one or both of these defences. If the risk had commenced, and the right to retain the premium had accrued, the assured had a right, notwithstanding his own intentions or those of his agents, to the protection of the policy so long as the subject was practically within the specified risks.

In case of insurance on freight "from Odessa to England," the captain sailed with an agreement to put into London or Newcastle, his ultimate destination being for Hamburg or Bremen. The vessel being captured, it was objected that she had not sailed on the specified voyage. Opposite judgments having been given in two Scotch courts, the case was finally decided in the House of Lords in favor of the assured.<sup>2</sup> One point made by Messrs. Park and Marshall, of counsel for the underwriters, was, that no freight would have been due at London; but it is plain that the whole freight may be insured for any part of a voyage.

938. *Under a policy on goods "at and from" a place, against marine, river, or lake risks, the risk begins on their being there on board of the vessel by which they are to be transported,<sup>3</sup> or boats, where that is the customary way of taking them on board.<sup>4</sup>*

939. *Whether specifying the risk to begin "on the loading of*

<sup>1</sup> Tasker v. Cunningham, 1 Bligh. 106; Smith v. Mobile Ins. Co. 30 Ala. Hou. L. 87. N. S. 167; Mobile Ins. Co. v. McMillan,

<sup>2</sup> Hall v. Brown, 2 Dow, Parl. Cas. 31 id. 711.

<sup>3</sup> Mellish v. Allnutt, 2 Maule & S. 2 Bos. & P. 435.



*goods* "is mere description, or a warranty that the goods shall be loaded at the port named?"

This description restricts the commencement of the risk, when it has any effect, and the jurisprudence presents divers instances of the failure of insurances under this description, which would have taken effect under the more general one "at and from."

A policy was made on goods "at and from Genoa, from the loading to equip for the voyage;" but the goods had been put on board at Leghorn. The policy was held not to attach in this case, because the event on which the risk was to commence had not happened. The court put stress upon the circumstance that the condition of the goods could not be known.<sup>1</sup>

Under another policy on goods "from the loading thereof on board on the coast of Brazil," and on the ship in the same manner; and no goods were put on board there, but the ship returned from the coast of Brazil with the same cargo she had carried thither from the Cape of Good Hope; the court decided that the risk never commenced on either ship or cargo.<sup>2</sup>

A similar case occurred in New York. It related to a policy on goods, "beginning the adventure from and immediately following the loading thereof at Vera Cruz." The vessel not being permitted to discharge there, returned to New Orleans with the same cargo she had carried out. It was the opinion of the court, that the event had not occurred on which the risk was to commence.<sup>3</sup> In this case Mr. Justice Livingston made a distinction between a policy on the ship and one on the cargo, saying there was a reason why in these circumstances the risk on the cargo should not commence, which did not exist in regard to the ship, for the ship was warranted seaworthy at the commencement of the risk, whereas there was no similar warranty in respect to the cargo; the loading of the goods he therefore thought to be of importance, as their condition at the time would thereby be better known. This distinction was probably suggested by the above case of *Hodson v. Richardson*; but the case of *Robertson v. French*, above cited, makes no such distinction, the policy in that case being on both ship and goods, and the risk was held to attach on neither.

<sup>1</sup> *Hodson v. Richardson*, 1 W. Blackst. 463; 3 Burr. 1477.

<sup>3</sup> *Graves v. Marine Ins. Co.* 2 Caines, N. Y. 339; *Scriba v. Ins. Co. of North*

<sup>2</sup> *Robertson v. French*, 4 East, 130. *America*, 2 Wash. C. C. 107.

The distinction seems to be very questionable, for the assured in a policy on goods must prove the loss to have happened during the risk, and the insurers are not liable for any loss that cannot be proved to have happened after the commencement of the risk, which is equivalent to a warranty against any previous damage or defect. If the decision is against the commencement of the risk, whether on the ship or cargo, the better reason seems to be, that the case does not present the terminus a quo specified in the policy; or that the loading at the specified port is warranted. It is quite material which construction is adopted, since, if the phrase is considered to be mere description, a defect may be supplied by other parts of the policy.

A number of judgments have been given in conformity with the opinions above cited.<sup>1</sup>

Where, under such a policy, the goods, though not actually shipped at the port, from the loading at which the risk was to commence, were yet overhauled so that their condition was satisfactorily ascertained, the court still held that the risk did not commence.<sup>2</sup> In this case, however, the court thought the loading at the port where the risk was to commence was a material circumstance, and in effect warranted in the policy, as it would diminish the risk from French capture.

In another case, again, in which a similar judgment was given, the court refers to the circumstance that it could not be known whether the goods had been damaged previously to the commencement of the risk.<sup>3</sup>

In a policy on goods at and from L., the risk to commence at and from the loading, the cargo had been brought thither in the same vessel, and the unloading and reloading of part of it at L., and moving and examining the remainder sufficiently to determine the duties payable there, was held, by Lord Ellenborough and his associates, to be a sufficient loading.<sup>4</sup>

An insurance was made in New York "upon all kinds of goods and merchandises laden, or to be laden, on board of the

<sup>1</sup> *Richards v. Marine Ins. Co.* 3 Johns. N. Y. 307; *Vredenburg v. Gracie*, 4 id. 444, n.      <sup>3</sup> *Horney v. Lushington*, 15 East, 46; 3 Campb. 85.

<sup>2</sup> *Spitta v. Woodman*, 2 Taunt. 416; 16 East, 188, n.      <sup>4</sup> *Nonnen v. Reid*, and same Plff. v. Kettlewell, 16 East, 176.

R., beginning the adventure from and immediately following the loading thereof on board at Cagliari." On the arrival at that place, all the cargo then on board, except some logwood, was hoisted upon deck, in order to take in 500 "salms" of salt, which was the only part of the cargo taken on board there. The cargo brought to Cagliari was restowed, and the ship proceeded on the voyage insured, in the course of which she was captured. Mr. Justice Van Ness gave the opinion of the court. He said: "The plaintiff's right to recover for any other part of the cargo than the salt, depends on the fact whether it was shipped at Cagliari or not. The hoisting the cargo out of the hold of the ship, and restowing it, does not amount to a loading it on board the ship, either according to the words, the reason, or the spirit of the contract. The policy attached therefore only upon the salt."<sup>1</sup>

But if in this case the goods had been landed upon a wharf, and then taken on board again, there seems to be no ground to doubt of this being a "loading," within the terms of the policy.

Under a policy on goods "at and from Gothenburg, beginning the adventure on said goods from the loading thereof on board," a memorandum was added to the policy, stating it to be in continuation of five former policies, specifying them. The goods had been put on board in Virginia, and it does not appear that they had been reloaded at Gothenburg, but rather that they had not. Lord Ellenborough, giving the opinion of the court, said, that "a very strict, and certainly a construction not to be favored, and still less to be extended, was adopted in *Spitta v. Woodman*. If there be any thing to indicate that a prior loading was contemplated by the parties, it will release the case from that strict construction." And this was considered as being indicated by the memorandum above mentioned, and accordingly it was held that the risk commenced at Gothenburg.<sup>2</sup>

This case shows that a loading at the port named is not necessary to fix the time when the risk begins, for the risk is held to have attached, though there was no loading or reloading at such port. What Lord Ellenborough intimated, therefore, in *Nonnen v. Reid*, as to the importance of reloading for the purpose of

<sup>1</sup> *Murray v. Columbian Ins. Co.* 11 Johns. N. Y. 302.      <sup>2</sup> *Bell v. Hobson*, 16 East, 240.

fixing the commencement of the risk, seems in this last case not to have been adhered to by the court.

But in another case decided in the Common Pleas, upon a policy on goods from the same place, in which the commencement of the risk was described in the same words, the risk was held not to have commenced, as the goods had not been shipped or reloaded at Gothenburg. At the time of making the policy, the underwriters knew that the goods had been loaded at London, but the court said, "they could not make the construction of a written instrument depend on the knowledge which the insurers might happen to possess of the facts."<sup>1</sup>

A similar decision was again made in the King's Bench, upon a policy on goods "at and from Gothenburg, beginning the adventure from the loading thereof aboard." They had been loaded at Christiansand, and not reloaded at Gothenburg. Lord Ellenborough, in giving the opinion of the court, said, that the commencement of the risk must be supposed to have been described in this manner to protect the insurers from liability on account of previous losses; and that construing the words "from the loading the goods on board" to mean the same as "from the time of their being on board" at the place named, would be giving them no effect, for this would be the construction without any such words.<sup>2</sup>

Yet the principle which governed the court in putting this construction upon these words had been rendered questionable, at least, in a former case, by the opinion of the same judge. It was upon a policy on goods "at and from Pernambuco to Maranh, and at and from thence to Liverpool, beginning the adventure upon the said goods upon the loading thereof on board where-soever." The goods were a part of the cargo carried outward to Pernambuco, a loss on which had happened on the voyage from Pernambuco to Maranh. It was decided that the risk commenced at Pernambuco. Lord Ellenborough said: "It certainly throws some difficulty in the way of this construction, that it may probably aid in covering a damage which happened before the commencement of the risk. But when we consider that the assured is bound to prove that the loss happened within the lim-

<sup>1</sup> Langhorn v. Hardy, 4 Taunt. 628.

<sup>2</sup> Mellish v. Allnutt, 2 Maule & S.



its of the voyage insured, that difficulty is in a great measure removed.”<sup>1</sup>

From all these cases it is not easy to determine the construction of a policy, in which the risk is to commence on the loading of the goods at a port named. If it be considered a warranty that the goods shall be loaded at such port, the courts seem, in some of the above cases, to have departed from the usual construction of express warranties. But if these words are to be considered as merely description, having at most the force of a representation, they will not affect the contract, if the policy provides any other way of ascertaining the time when the risk commences.

These discrepant decisions evidently do not coincide in support of any general proposition. That to which they seem to be the nearest approximation, and which may be adopted without a departure from any general principle, is, that

*This specification of the terminus a quo, unless it appears by the policy to be intended as a warranty of the loading at the designated place, is to be taken as mere recital, description, or intention or expectation, being at most an implied representation of the loading, and is to be construed accordingly.*<sup>2</sup>

There is no need of resorting to the doctrine of warranty to provide for the case of aggravation of the risk by reason of the cargo not being put on board at the place named, which is mentioned in some cases,<sup>3</sup> since that comes appropriately within the doctrine of representation and concealment.

A more recent case has occurred on this specification of the terminus a quo, which is free from the complexity of the foreign political relations growing out of the wars consequent upon the French revolution of 1789, in which most of the preceding cases were involved. It was an insurance on a cargo “from the loading thereof aboard,” on the coast of Africa. A total loss occurred, while a part of the outward cargo remained on board, and the question was whether this should be included in the loss, and the King’s Bench decided that it could not be so. Lord Tenter-

<sup>1</sup> Gladstone v. Clay, 1 Maule & S. 418.      <sup>3</sup> Spitta v. Woodman, 2 Taunt. 416; 16 East, 188, n.; Hodson v. Richardson,

<sup>2</sup> See Coggeshall v. American Ins. Co. 3 Wend. N. Y. 283.      1 W. Blackst. 463; 3 Burr. 463.

den, giving the opinion of the court, put the decision upon the ground that there was nothing in the policy, whether in the description of the voyage or otherwise, from which the court could infer the intention to include any part of the outward cargo.<sup>1</sup>

The proposition above laid down does not seem to me to be inconsistent with this case, nor with the doctrine that the policy is to govern in all cases.

940. *In a policy upon goods loaded from a wharf, the risk usually commences with the responsibility of the owners and master, and when that of the wharfinger ceases.*<sup>2</sup>

941. *Whether, under a policy on goods on board of a certain ship, the risk will commence in boats by which they are brought to the ship, will depend upon the hydrographical character of the port or coast, the usage as to loading, and upon the boats being those of the vessel, or public lighters, or those of the shipper, and upon the goods being in charge of the master and crew, or of boatmen employed by the shipper?*

A policy was made in October, "on all kinds of lawful goods and merchandise, laden or to be laden on board of the ship Clinton, for and during six months, commencing on the 10th of July, 1826, beginning the adventure on such goods from and immediately following the lading thereof on board of the said vessel, from the 10th of July, and so shall continue until the said goods shall be safely landed on the 10th of January, 1827;" with an agreement indorsed to extend the policy two months for an additional premium. The vessel was engaged in a trading voyage on the western coast of South America, where a basket of "plata pina" (virgin silver) was lost from one of the flat-boats or rafts, called "balsas," employed by the assured to bring it to the vessel, this being the customary way of bringing the cargo to vessels. The Supreme Court in New York held, that the risk commenced on the goods on board on the 10th of July, and on those afterwards loaded, from their coming within the description of the terminus a quo in the policy, and that the risk commenced on the "balsas" to the same effect as if the articles had been on board of the ship, on the ground that this was the customary way of taking on board cargo on that coast.<sup>3</sup>

<sup>1</sup> Rickman v. Carstairs, 5 Barnew. & Ad. 651.

<sup>2</sup> See Corban v. Downe, 5 Esp. 41.

<sup>3</sup> Coggeshall v. American Ins. Co. 3

942. *Policies not unfrequently have different termini a quo and ad quem for different parts of the cargo :*

As where goods are insured from the lading thereof on board of a vessel that has liberty to touch and trade at different ports, that is, to discharge and take in goods. In such case a policy exclusively on the homeward cargo, from loading, will commence on each part successively as it is put on board, and one exclusively on the outward cargo will terminate on the several parcels of goods as they are successively discharged.<sup>1</sup>

943. The risk under a policy on freight cannot commence until the interest has accrued.<sup>2</sup>

Where the interest in freight has accrued previously to the time from which the insurers are to take the risk, the commencement of the risk on this interest is determined by the same principle upon which it depends in the case of an insurance of the ship or goods.

944. *In order to the commencement of the risk on freight, the vessel must be on the way towards the place for loading the cargo, or, if she is at the loading port, must be in preparation for loading.*

Where the policy was on freight at and from Algoa Bay to London, the vessel arrived at Algoa Bay, where, having discharged her cargo, excepting about seventy tons, she was wrecked. The captain said that he was ready to begin to take on board his homeward cargo at the time of the vessel being wrecked, it being necessary to keep on board some of the outward cargo to ballast the ship. The jury were instructed by Lord Lyndhurst, C. B., that the risk on the policy had attached if the master was ready to begin to take on board his homeward cargo.<sup>3</sup> That is to say, where the risk on freight is to com-

Wend. N. Y. 283. The court cites *Pelly v. Royal Exch. Ass. Co.* 1 Burr. 341; *Tierney v. Etherington*, id. 348; and *Parsons v. Mass. F. & Mar. Ins. Co.* 6 Mass. 197.

<sup>1</sup> *Violett v. Allnutt*, 3 Taunt. 419; *Grant v. Paxton*, 1 id. 463; *Same v. Delacour*, id. 466; *Barclay v. Stirling*, 5 Maule & S. 6; *Hunter v. Leathly*, 10 Barnew. & C. 858; 7 Bingh. 517,

are all cases of leave to trade at different ports, and in the ordinary policies on whaling voyages, the insurance ceases successively on the outward, and attaches successively on the return cargoes. See *supra*, c. 3, s. 12.

<sup>2</sup> *Vide supra*, c. 3, s. 11.

<sup>3</sup> *Williamson v. Innes*, 8 Bingh. 81, n. See *Inglis v. Vaux*, 3 Campb. 437.

mence "at" a place, it will commence as soon as the assured has that interest at that place.<sup>1</sup>

Under a policy on freight, "beginning the adventure on said freight from and immediately following the loading thereof on board said vessel," the risk was held not to commence until the vessel had begun to load.<sup>2</sup> And the loss of freight by the loss of the vessel in the port of Canton, while waiting for a cargo that had been engaged, was held not to be covered under that description.

Under a policy on freight from A to B, to take a cargo at the latter place for C, the risk on the whole freight to C commences on the vessel's sailing empty from A.<sup>3</sup>

945. *If the policy on any subject is "from," instead of "at and from" a place, the risk begins at the time of the vessel's sailing; that is to say, at the time of weighing anchor, and breaking ground for the voyage, with all the preparations completely made.*<sup>4</sup>

946. *In a policy on ships "from" a port which has an out-port at a considerable distance, and vessels of the same size usually take in part of the cargo at the port, and the remainder at the out-port, the risk commences on sailing from the former.*

Thus, under a policy "from Amsterdam," the risk is assumed between that port and the Texel, and covers a loss while lying in the Texel Roads.<sup>5</sup>

947. *Where the policy does not attach at the outset for want of a subject coming within the description in the policy, an indorsement of liberty to touch at another port will not cause it to attach, the underwriters not knowing that the risk had not commenced.*<sup>6</sup>

<sup>1</sup> See also *Flint v. Fleming*, 1 Barnew. & Ad. 45; 1 Lloyd & W. Cas. 257.

<sup>2</sup> *Gordon v. Am. Ins. Co. of N. Y.* 4 Den. N. Y. 360. The same rule applies to profits: *Halhead v. Young*, 6 Ell. & B. 312; 36 Eng. L. & Eq. 109.

<sup>3</sup> *Hodgson v. Miss. Ins. Co.* 2 La. 341.

<sup>4</sup> *Pothier, Ins. a.* 63; *Thellusson v.*

*Fergusson*, Dougl. 346; *Same v. Staples*, id. 351, n.; *Audley v. Duff*, 2 Bos. & P. 111; *Sellar v. M'Vicar*, 4 id. 23. As to what is "sailing," see c. 9, s. 3.

<sup>5</sup> *Mey v. South Carolina Ins. Co.* 3 Brev. No. C. 329.

<sup>6</sup> *Scriba v. Ins. Co. of North America*, 2 Wash. C. C. 107.



## SECTION II. TERMINATION OF THE RISK.

948. *All policies*, either expressly or by implication, *stipulate for the beginning*, or *TERMINUS A QUO*, and end, or *TERMINUS AD QUEM*, of the risk.

949. Life and marine policies frequently, and fire policies usually, are made for a certain period of time, from a certain day, or from a certain hour of a certain day; and these are denominated *TIME POLICIES*, or *TERM POLICIES*.

In such a policy, the time, as to the commencement and termination of the risk at any day or hour, is to be reckoned at the place where the policy is made, in whatever other place the subject may be,<sup>1</sup> unless the time at another place is referred to in the policy in this respect.<sup>2</sup>

950. *The ultimate limit of the risk*, or *terminus ad quem*, in policies other than those for a certain time, in some event, as the death of the party insured, arrival of ship at a certain place, or discharge of a cargo.

It is sometimes agreed that the risk shall end or be prolonged at the election of one or the other party:<sup>3</sup>

As a bottomry risk to the first port the vessel may make:<sup>4</sup>

Or the liberty, in a bottomry bond for three years, to reduce the amount by payment.<sup>5</sup>

Insurance being for six months on a ship "bound on a voyage from B. to M.," with liberty of a policy for six months more at a certain premium for that period, Mr. Justice Cranch ruled that the risk continued during the second six months on another voyage, that to M. having been performed during the first six months.<sup>6</sup>

The *duration of the risk* is sometimes put in the alternative. Insurance to "S. or B." does not cover a voyage to S. and thence

<sup>1</sup> Walker v. Protection Ins. Co. 29 Me. 317.

<sup>2</sup> I do not know of any law limiting the period of time policies in any of the States, like 35 Geo. III. c. 63, s. 12, limiting time policies to one year.

<sup>3</sup> Sullivan v. Mass. Mut. F. Ins. Co.

<sup>2</sup> Mass. 318.

<sup>4</sup> The Jane, 1 Dods. Adm. 461.

<sup>5</sup> Thorndike v. Stone, 11 Pick. Mass. 183.

<sup>6</sup> Stuart v. Columbian Ins. Co. of Alexandria, 2 Cranch, Dist. Ct. 442.

to B., and the underwriters are not liable for a loss between S. and B.<sup>1</sup>

A respondentia loan being on a risk from N. to C. and back to N., to be paid on arrival at N., or at the end of eighteen months, whichever might first happen, it was held that the subsequent consent of the lender, that the vessel might visit other ports, did not enlarge the period of the risk, which was held to terminate at the end of eighteen months.<sup>2</sup>

A bottomry loan being for an India voyage not exceeding thirty-six months, the ship was detained in India, by the Mogul, until after the end of that period, and was afterwards captured on its homeward voyage. Lord Hardwicke decided that the risk had terminated and the bond become absolute, at the end of the thirty-six months.<sup>3</sup>

951. All policies have express and implied conditions for the termination of the risk at a time short of the terminus ad quem, whether the ultimate limitation is a certain time or a certain event.

952. The *termination of the risk by non-compliance with a representation or warranty*, after the risk has commenced, has been considered under those heads, *and that by deviation* is to be considered subsequently.

The payment of the premium is the most frequent condition of the continuance of the risk in life and fire policies. Under the provision for the termination of a fire policy, if the premium shall not be paid for its continuance within fifteen days after the expiration of the year, the policy will be continued if the premium is paid within that time, though a loss may have taken place in the mean time, after the year has expired.<sup>4</sup>

Some fire policies have a provision, that in case of alterations of the insured building, or additions to it, or the erection of others within a certain distance, the underwriters may, at their election, cancel the policy, returning premium pro rata.<sup>5</sup>

953. It is often provided, that *the risk may be continued or*

<sup>1</sup> Dodge v. Essex Ins. Co. 12 Gray, Mass. 65.

<sup>2</sup> Niagara Ins. Co. v. Searle, 2 Hall, N. Y. 22.

<sup>3</sup> Ingleden v. Foster, 4 Vin. Abr. 281; Marshall, Ins., 2d ed. 751.

<sup>4</sup> McDonnell v. Carr, Hayes & J. 203.

Exch. Ir. 257. If the policy provides that payment shall be requested, it is sufficient to mail a request: Lothrop v. Greenfield Ins. Co. 2 All. Mass.

82.  
<sup>5</sup> Fabyan v. Union Ins. Co. 33 N. H.

*renewed* from time to time, by the assured's paying the premium at successive periods,<sup>1</sup> or complying with other specified conditions.

A policy was made on a vessel "from Salem to any place or places, backwards and forwards, round the globe one or more times, during her stay at all such places, until her return to the United States," at a certain premium per month; it being a voyage for seals and oil. It was insisted, on the part of the insurers, that the duration of the risk ought to be limited by the usage of such voyages, otherwise it might continue as long as the vessel should exist as such. The court said they saw no objection to its so continuing.<sup>2</sup> But in general the continuance of the risk is absolutely limited in the policy by some time, or place, or event.

Under a provision to continue the risk, if the vessel should be at sea at the end of a year, "until arrival at a port of discharge," the vessel was captured and carried into England, under the pretence that she was bound to an enemy's port, and was detained at Bristol at the expiration of the year, whence, after being released, she pursued her voyage. It was objected to the continuance of the risk, that the vessel was not "at sea" at the expiration of the year. Chief Justice Parker, giving the opinion of the court, said: "A vessel is considered 'at sea' within the common meaning of the term, while on the voyage, although during a part of the time she is necessarily within some port."<sup>3</sup>

Under a policy on a vessel for a year, to be continued, if she should be at sea at the end of the year, to her port of destination in the United States, her destination at the end of the year was from Rotterdam to Newcastle, and thence to New York. It was held in New York that the risk continued to the latter place.<sup>4</sup>

A vessel was insured for one year from the 6th of October, 1834, and if then "at sea," as expressed in one policy, or "on a passage," as expressed in another, the risk was "to continue until her arrival at her port of destination and discharge." On the 25th of September, 1835, the brig got under way at Bangor,

<sup>1</sup> *Salvin v. James*, 6 East, 571; 2 Smith, 646. See c. 1, s. 9.

<sup>2</sup> *Cleveland v. Union Ins. Co.* 8 Mass. 308.

<sup>3</sup> *Wood v. New England Mar. Ins. Co.* 14 Mass. 31.

<sup>4</sup> *Union Ins. Co. v. Tysen*, 3 Hill, N. Y. 118.

with her full cargo on board ready to proceed on her voyage to the United States, and dropped down several miles in the Straits of Menai, when she came to anchor on account of contrary winds. She afterwards attempted, for several successive days, to proceed on her voyage, but did not get out of the Straits and pass off the pilot-ground until the 8th of October, the second day after the expiration of the year. The question was made whether she was "at sea" or "on a passage," on the 6th of October, within the meaning of the policies, so that the risk continued. Shaw, C. J.: "The term 'at sea' is used in contradistinction to arrival in port. If the vessel has sailed or commenced a passage, she must be considered to be 'at sea,' within the meaning of this clause. When a vessel quits her mooring, in a complete readiness for sea, and it is the intention of the master to proceed on the voyage, and she is afterwards stopped by head winds, and comes to anchor, still intending to proceed as soon as the wind and weather will permit, this is a sailing on the voyage." And it was held that the vessel was at sea within the meaning of the policy on the 6th of October. And the expressions "at sea," and "on a passage," were considered to be equivalent to each other.<sup>1</sup>

A vessel being insured in Philadelphia for a year, with liberty of the globe, and, "if at sea at the end of the year," the risk "to continue at the same rate of premium till arrival at her port of destination in the United States," was at the end of the year at sea on a passage from Rio Janeiro to the island of Jersey. Having sustained damage subsequently on the same passage, she put into Falmouth, in England, for repairs, and being repaired, sailed for Altona, and there delivered her cargo and took another on freight for New Orleans, where she arrived. In a suit for loss by the damage sustained after the end of the year, the assured contended that the risk continued until her arrival at New Orleans. The underwriters, on the other hand, insisted that the risk terminated at the end of the year, on the ground that she was not at that time on a voyage to the United States. The court was of this latter opinion, and set aside the verdict which had been rendered for the assured.<sup>2</sup>

<sup>1</sup> Bowen v. Hope Ins. Co.; Same v.      <sup>2</sup> Eyre v. Marine Ins. Co. 6 Whart. Merchants' Ins. Co. 20 Pick. Mass. 275. Penn. 247.



On the new trial, the assured offered evidence that, according to usage and the common understanding in Philadelphia as to such a provision, the risk continued, if the vessel was at sea at the end of the year, on whatever destination she was bound, until her arrival in the United States. This testimony was ruled out by the presiding judge. The case being again brought before the court, it was held that the evidence was admissible. In respect to the objection that, by the construction contended for and proposed to be established by such testimony, the assured might prolong the risk indefinitely, so long as the ship should last, Mr. Justice Rogers, who gave the decision of the court, remarked, that it was competent for the parties to make such a contract if they chose to do so.<sup>1</sup>

A vessel insured with the provision to continue the risk if she should be at sea at the end of six months, was then at St. Thomas, in the West Indies, repairing, having sustained damage on her passage thither, to take a cargo there for New York. The Supreme Court of New York held that the risk had terminated, the vessel not being then at sea, within the meaning of the policy.<sup>2</sup>

The vessel is "at sea" within the stipulation, if she has "sailed" on a passage, as distinguished from "departing" from a port,<sup>3</sup> that is, if she is ready to proceed and has broken ground, though she has made little or no progress, and though she may be in a river or canal from which she is to proceed to sea. It was so held in the case of a vessel insured for a year from the 8th of October, and if at sea at the end of that period, "the risk to continue till her arrival in the United States at the same rate of premium." It was at Rotterdam near the end of the year, and the master, not finding freight there, decided, in pursuance of his instructions, to go to Newcastle-upon-Tyne, and thence to New York. The vessel sailed on the canal to the river Meuse on the 5th of October, and all her papers were made out, and she was ready to depart, having only to take a clearance at Helvoetsluys. Owing to adverse winds, she did not proceed

<sup>1</sup> *Eyre v. Marine Ins. Co.* 5 Watts ton *v. American Ins. Co.* 7 Hill, N. Y. & S. Penn. 116. 321, in the Court of Errors.

<sup>2</sup> *Burrows v. Turner*, 24 Wend. N. Y. <sup>3</sup> *Vide supra*, for the distinction, c. 276, in the Supreme Court; also *Hut-* 9, s. 3, No. 777.

until the 8th, and reached Helvoetsluys on the 10th, where she was detained until the 26th. It was decided in New York that the risk continued.<sup>1</sup>

954. *Insurance on a vessel until its return to a place, does not terminate until its arrival in the harbor proper of such a place.*

A ship was insured for a premium, at a certain rate per annum, "at and from Boston to all ports and places on the globe, and until her return to Boston, not exceeding two years." She sailed from the coast of Brazil for Boston, and on arriving in Boston Bay, below the harbor, within the two years, was ordered by the owner to put into Salem, at which port she accordingly put in, for the purpose of being repaired. It was held that the risk did not terminate on the arrival of the ship in Salem; and that the ship's sailing for Boston under such a policy did not limit the risk, from the time of her so sailing, to a voyage to Boston; but that the destination of the ship might be altered at any time before her arrival at Boston, and the risk under the policy would still continue.<sup>2</sup>

955. *Where a policy is to terminate on the ship having arrived at a certain island or district, and been moored twenty-four hours in safety, it terminates at the first port within such limits at which the master voluntarily arrives, and so remains moored.*

Under a policy on a ship and cargo, "from Georgia to Jamaica" generally, with such a provision, a part of the cargo was destined to Montego Bay, and the rest to St. Anne's. The ship arrived at Montego Bay, and after remaining there in safety nearly a month, and discharging the part of the cargo which was to be delivered there, she sailed for St. Anne's, and was lost on the passage. Lord Kenyon ruled that the risk ended at Montego Bay.<sup>3</sup>

<sup>1</sup> Union Ins. Co. v. Tysen, 3 Hill, N. Y. 108. The clause in time policies, that if the vessel is at sea at the termination of the risk, the policy shall be continued until her arrival at a port of destination, is held to mean not the final port of destination, but the next port of destination for the purposes of the voyage, and this port may be an open roadstead. Gookin v. New England Ins.

Co.; Cole v. Union Ins. Co. 12 Gray, Mass. 501; Wales v. China Ins. Co. 8 All. Mass. 380.

<sup>2</sup> Ellery v. New England Ins. Co. 8 Pick. Mass. 14.

<sup>3</sup> Leigh v. Mather, 2 Esp. 412; Park, Ins. 64. See also Camden v. Cowley, 1 W. Blackst. 417; Barras v. London Ass. Co. Park, Ins. 64; Marshall, Ins. 266, 2d ed.

956. Insurance on a vessel "at and from New Orleans, Campeachy, and Havana, for a period of six months," is a time policy, and does not limit the risk at, from, and to those ports, but admits of sailing for any port of destination.<sup>1</sup>

957. *Insurance to ports in S., comprehends a place on the coast where it is customary to land and to take in cargoes, though not a very secure, well-protected port.*

958. A policy to two ports on the coast of B. is to any two, at the election of the assured.<sup>2</sup>

A ship being insured to Barcelona, and "two other ports in Spain," and thence to Great Britain, discharged her cargo at Tarragona, and then proceeded to Saloe, which is just round the headland, about ten miles from Tarragona, and was lost there while taking in her cargo. The underwriters objected that Saloe was not a "port" within the terms of the policy. It has a custom-house, conveniences for loading and discharging ships, a port-captain and harbor-master, and consular officers reside there. Saloe Bay, where the vessels lie, is not more open than some other Spanish ports. The underwriters were held to be liable.<sup>3</sup>

959. *Where a vessel is insured to, at, and from an island or district, it is a matter of construction in the particular case, whether the risk continues from port to port there.*

A vessel insured at and from N. to the island of Trinidad, in the West Indies, and "at and from the island of Trinidad," to N., sailed from Port Spain, the only one in Trinidad where foreign vessels were permitted to enter and clear, to another port in the island to take in a part of her homeward cargo, the master's intention being to return to Port Spain to take on board the remainder of their cargo and clear there, but the vessel was lost on the passage to such other port. It was held that the risk continued on such passage.<sup>4</sup>

960. *Insurance to a certain place "and a market," covers the risk to other places in the same region or vicinity.*

Under a policy on a ship to "Barbadoes and a market," the court said, the "vessel may bonâ fide go from island to island,

<sup>1</sup> Groussett v. Sea Ins. Co. 24 Wend. N. Y. 219.

<sup>2</sup> Vandervoort v. Smith, 2 Caines, N. Y. 155.

<sup>3</sup> Sea Ins. Co. of Scotland v. Gavin, 2 Dow & C. Hou. L. 129.

<sup>4</sup> Dickey v. Baltimore Ins. Co. 7 Cranch, 327.

until her cargo is disposed of; but we do not mean to say that the same construction is to be given to a policy in any other trade than that to the West Indies.”<sup>1</sup> But an insurance to any island in the West Indies, some of those islands being hostile, will be limited in construction to those which are friendly.<sup>2</sup>

961. *Insurance to A., and “if turned away,” then to a “neighboring” or “a near open port,” refers to the geographical situation of such other port, rather than to the difficulty or facility of proceeding to it.*

A ship being insured from New York to Bourdeaux, with a provision that, if turned away, she might “proceed to a near open port,” Mr. Justice Spencer, for the court, said: “The terms ‘near open port’ must be considered as used in a geographical sense, and not as depending on the facility of reaching a distant port, if the wind should happen to be favorable. They admit of some latitude, but still there must be a limitation. If it be conceded that L’Orient comes within the expression, ‘near open port,’ in reference to Bourdeaux, it is perhaps as great an extension of the import of the words as ought to be allowed. We are of opinion that neither Falmouth, Plymouth, nor Guernsey can be considered a near open port to Bourdeaux.”<sup>3</sup>

A vessel being insured to Amsterdam, with liberty, if turned away, to enter a neighboring port, being turned away from Amsterdam, was held to be protected under this liberty in proceeding to London; there being at the time no nearer port which she could safely enter.<sup>4</sup>

962. *Insurance on a vessel to the port of discharge, or until arrival at port, in the singular, terminates at the first such port.* The questions in this case are, what is a port, and what is such an unloading at a port as to render it a port of discharge, and what is an arrival.

Under insurance “to the vessel’s port of discharge in Europe,” the vessel sailed from Boston bound to the Meuse, but the master, understanding that the vessel and cargo would be confiscated if he proceeded to Rotterdam, turned to Gothenburg, to

<sup>1</sup> Maxwell v. Robinson, 1 Johns. N. Y. 333.

<sup>2</sup> Neilson v. De La Cour, 2 Esp. 619.

<sup>3</sup> Tenet v. Phœnix Ins. Co. 7 Johns. N. Y. 363.

<sup>4</sup> Fergusson v. Phœnix Ins. Co. 5 Binn. Penn. 544.



inquire the state of the markets in the Baltic, and after leaving Gothenburg, and while proceeding to a market in the Baltic, the vessel was captured." It was held that the risk had not terminated.<sup>1</sup>

A ship being insured from the United States to Europe and back "to her port of discharge in the United States," cleared from St. Ubes, with a load of salt, for New York, on arriving at which port, the captain immediately advised his owner, at Hartford, of his arrival, and the owner, in reply, without any delay, ordered the captain to proceed with the ship and cargo to Middletown, on Connecticut River. As the vessel could not proceed up the river with her whole cargo, she must be lightened either at New York, or at the mouth of the river. The captain, after consultation, lightened her at New York, by discharging about three thousand bushels of salt into lighters, to be transported to Middletown. The usual entry of ship and cargo was made at New York, as at the port of discharge, and the duties were paid on three boxes of lemons, the only part of the cargo subject to duties. No part of the cargo was landed at New York. It was held in Connecticut, that New York was the port of discharge, stress being laid upon the master's having so intended, and upon the entry and payment of duties there.<sup>2</sup> But query of this.

It was held, in another case, that the landing of 150 boxes of lemons at New York, while the ship was waiting for orders from the owner, the lemons being in a perishing state and likely to be spoiled, does not make New York the port of discharge under such a policy.<sup>3</sup>

And so it was held in respect to the discharging of the crew in New York, and immediately shipping another to proceed to Middletown, on the owner's giving directions to this effect.<sup>4</sup>

A vessel, being insured from the West Indies to her port of discharge in the United States, put into Savannah, in Georgia, where the master intended to discharge his cargo, if the market was favorable; but not finding it so, he concluded to proceed to

<sup>1</sup> Coolidge v. Gray, 8 Mass. 527.

<sup>3</sup> Sage v. Middletown Ins. Co. 1

<sup>2</sup> King v. Middletown Ins. Co. 1 Conn. 239.  
Conn. 184.

<sup>4</sup> King v. Hartford Ins. Co. 1 Conn.  
333.

Boston, after making repairs at Savannah. It was held, that the risk continued to Boston.<sup>1</sup>

963. *Where insurance is made to a port or ports, or to an island or district with liberty to touch and trade at divers ports, or "to the final port of discharge," the risk will terminate when the whole cargo is discharged, or when the objects of the voyage to ports for the purpose of delivering cargo are so far accomplished, that the delivery of the remainder at any ulterior port is no inducement worth consideration to proceed thither.*

A ship was insured "from Liverpool to Martinique, or any other of the Windward or Leeward Islands, with liberty to touch and stay at any ports or places whatsoever to take on board and land goods, stores," &c. The outward cargo was disposed of at Martinique, excepting a small quantity of bricks and lime, with which the captain sailed for Antigua, at which island he lay, waiting to procure a freight home and dispose of the rest of his outward cargo, from the 31st of May to the 8th of July, when the vessel was wrecked. Lord Ellenborough instructed the jury, that "the captain had no right to mix up together the two objects of disposing of the remnant of the outward cargo and procuring a homeward cargo, at the risk of the underwriters on the outward voyage. When the disposal of the outward cargo ceased to be the sole reason of his stay at Antigua, these underwriters were discharged."<sup>2</sup>

The concluding remark in this ruling needs to be qualified. The risk should continue on the ship so long, at least, as the disposal of the outward cargo is the principal or substantial reason for proceeding to an ulterior port. The risk in a policy on cargo will, as we shall see, continue still longer.<sup>3</sup>

A ship was insured from the West India Islands to the United Kingdom, and back "to Barbadoes and all or any of the West India colonies, (J. and D. excepted,) until the ship should be arrived at her final port, with liberty to proceed to and touch and stay at any ports or places whatsoever, and to load and unload goods." She sailed from Liverpool to the West Indies with a cargo, about one eighteenth part of the value of which,

<sup>1</sup> Lapham v. Atlas Ins. Co. 24 Pick. Mass. 1.

<sup>3</sup> See Moore v. Taylor, 1 Ad. & E. 25.

<sup>2</sup> Inglis v. Vaux, 3 Campb. 437.

and more than one third part of the tonnage, consisted of coals and bricks. On arriving at Barbadoes the cargo, except the coals and bricks, was discharged, and 330 empty molasses casks taken on board, and the ship, being about to sail on the 11th of August to Berbice for a cargo of molasses, was totally lost on the night of the 10th. Mr. C. J. Denman ruled at the trial, that, "if the cargo had been substantially discharged at Barbadoes," the risk had terminated. And he was of opinion that it had been so, considering the coals and bricks to have been retained on board for ballast; and so the jury found, though Littledale, J., doubted whether the verdict was right. All the court, however, agreed that, if the object of going to Berbice was to find a market for the coals and bricks, or deliver them, the risk would have continued to that island, notwithstanding another purpose in going thither might have been to load for another voyage.<sup>1</sup>

Where the policy was on ship, cargo, and freight, from the Canaries "to any port or ports" in Spanish America, the construction adopted was, that the voyage terminated when the cargo was discharged, and that the policy would not cover a new voyage undertaken from one port of Spanish America to another.<sup>2</sup> The court seems to be of opinion that the risk would continue to the last port of discharge, and this agrees with the case just cited.

A vessel being insured from Beverly to "Bilboa, or a port of discharge in Europe," and from Europe to her port of discharge in America, or to a port or ports in India, proceeded to Bilboa, where a part of the cargo was discharged, and then sailed to Lisbon. It was contended, in behalf of the assured, that a policy to Bilboa, "or" a port of discharge, was equivalent to one to Bilboa, "and" a port of discharge. Chief Justice Parker, giving the opinion of the court, said: "The plain meaning of the expression is, to Bilboa or some other port of discharge." It was accordingly held, that the risk on the outward voyage ended at Bilboa.<sup>3</sup>

A vessel being insured "to port or ports of discharge in the river La Plata," took a cargo of flour, lumber, and 80 bundles of

<sup>1</sup> Moore v. Taylor, 1 Ad. & E. 25.

Sup. Jud. Ct., Essex, October, 1820.

<sup>2</sup> Stocker v. Harris, 3 Mass. 409.

See also Bulkly v. Protection Ins. Co.

<sup>3</sup> Stephens v. Beverly Ins. Co. Mass. 2 Paine, C. C. 82.

shingles, and having discharged her whole cargo excepting 35 bundles or  $7\frac{1}{2}$  thousands of shingles, worth about \$50, at Monte Video, and taken on board 5000 horns and four passengers, to be landed at Buenos Ayres, proceeded to the latter port, where she was lost. The court in Massachusetts were of opinion, that, if the cargo was substantially discharged at Monte Video, and the object in proceeding to Buenos Ayres was substantially ulterior, and the discharge of the remnant of the outward cargo constituted no material inducement thereto, the risk had terminated at Monte Video, and, though it was a question for the jury, intimated that, in their opinion, the risk had ended.<sup>1</sup>

Insurance was made on the cargo of the ship Penang to Lintin, Hong Kong, Macao, Canton, &c., and all and any other port, and places, &c., "backwards and forwards," with leave to transship or reship the goods on board of the same or other vessel or vessels, or from such vessels, "continuing the risk by land and water until the goods should arrive at their final place of destination." The consignees, deeming it unsafe for the vessel to proceed from Macao up to Canton, on account of the hostilities between the Chinese and British at the time, (1842,) chartered the James Laing to accompany the Penang from Macao to Hong Kong, that the cargo might be there transshipped to the latter, and remain until it could be sent up to Canton or to some other port. After a part of the goods had been transshipped to the James Laing, she was wrecked, and the loss thereby was the subject of a suit. It was alleged in behalf of the underwriters, that Hong Kong had been made the final port of destination, and that the risk had terminated on the goods put on board of the James Laing; but Lord Denman, and his associates, held that the risk had not terminated.<sup>2</sup>

In another policy before the same court, on the same cargo, with a similar description of the voyage, excepting leave to transship the goods, the risk was held to have terminated on the transshipped goods, on account of change of risk in the nature of a deviation, by unnecessarily shifting it to a different vessel.<sup>3</sup>

The interest of the captain in a cargo was insured "from

<sup>1</sup> *Upton v. Salem Commercial Ins. Co.* 8 Metc. Mass. 605.

<sup>2</sup> *Oliverson v. Brightman*, 8 Q. B. 781.

<sup>3</sup> *Bold v. Rotheram*, 8 Q. B. 797.



London to all or any of the ports or places in the East Indies, China, or Persia, or elsewhere, on this or the other side of the Cape of Good Hope, until arrival at the last place of discharge in the outward voyage." The cargo carried under the charter-party was wholly discharged at Calcutta; but the captain, having made a part of his investment at Calcutta, intended to make the rest at Madras, whither the ship was ordered by the company on an intermediate voyage. A loss happened on the voyage to Madras, and a question was made whether the risk ended at Calcutta. Lord Ellenborough ruled that Calcutta was "the last port of discharge on the outward voyage."<sup>1</sup>

Insurance being made on a ship "to any port or ports in the river Plate, until her arrival at the last port of discharge" in the river; the captain intended to put into Buenos Ayres, and discharge his cargo there, but hearing, after he came into the river, that Buenos Ayres was in the hands of the enemy, he put into Monte Video, intending to discharge his cargo there, if the market was favorable; but at the same time not relinquishing the design of proceeding to Buenos Ayres to complete the discharging of the cargo, if it should be practicable. While the vessel lay at Monte Video, a loss took place; Buenos Ayres still remaining in the possession of the enemy. The court was of opinion, that the risk ended at Monte Video, as the captain did not contemplate going to any other port except Buenos Ayres, and he could not legally go thither while the place was in possession of the enemy.<sup>2</sup>

964. *An insurance being to a certain port, the object of the voyage being a delivery of the cargo there, will terminate at a substituted port of delivery.*

A ship was insured "from Boston to Tonningen." The ship was compelled by stress of weather to enter the Elbe for safety, and she proceeded up to Gluckstadt. The consignee received the cargo there. Mr. Justice Parker gave the opinion of the court, "that the voyage was completed by the consent of the master and consignee to deliver and receive the cargo at Gluckstadt, this being a substitution of that place for Tonningen. The object of the voyage, as understood by the parties, was to

<sup>1</sup> Richardson v. London Ass. Co. 4 Campb. 94.

<sup>2</sup> Brown v. Vigne, 12 East, 283.

carry the cargo to Tonningen, and it was competent to the parties to put an end to the contract between them, by adopting Gluckstadt as the place of delivery.”<sup>1</sup>

The risk on a ship, insured for a fishing voyage, is not terminated by the arrival of a part of her cargo sent home by another.<sup>2</sup>

965. *The port of discharge is that of the actual discharge of the cargo, notwithstanding a different one, or more than one, may have been intended.*

As where, in a trial before Buller, J., a ship being insured to her last port of discharge in India, the whole cargo was discharged at Madras, though it had been intended to discharge a part of it at a subsequent port.<sup>3</sup>

966. *The insured voyage being abandoned, the risk ends.*

Goods were insured from London to Revel, and the master, having intelligence on the voyage that there was an embargo on English vessels at that port, put back for England, and a loss took place on the way thither. Lord Ellenborough: “If the ship, being unable to enter at Revel, had returned, with an intention of ultimately completing the original voyage, a question of some nicety might have arisen. But the original voyage was abandoned, and the underwriters were discharged.”<sup>4</sup>

The same judge said in another case: “There may be causes for a ship putting back for a time, without any intention of abandoning her voyage; as the approach of an enemy, or a temporary embargo; or as in a case which occurred before Lord Kenyon, where a ship bound to a port in the Baltic found it blocked up by ice, on which she put back, but afterwards, on a thaw, sailed again.”<sup>5</sup>

In a case of insurance “to Gothenburg, and one port of discharge in the Baltic,” the captain, while at Gothenburg, elected St. Petersburg as his port of destination, but after sailing changed his mind, and determined to go to Stockholm, and was captured

<sup>1</sup> Shapley v. Tappan, 9 Mass. 20.

<sup>4</sup> Blackenhagen v. London Ass. Co.

<sup>2</sup> Phillips v. Champion, 1 Marsh. 402;

<sup>1</sup> Campb. 454. See also Richardson v.

6 Taunt. 3.

Maine Fire & Mar. Ins. Co. 6 Mass.

<sup>3</sup> Moffatt v. Ward, 4 Dougl. 31, n.

102, at p. 177, 121.

See also Ellery v. New England Mar.

<sup>5</sup> Brown v. Vigne, 12 East, 283.

Ins. Co. 8 Pick. Mass. 14.

before altering his course from St. Petersburg to Stockholm, while he was on the common course to both those places. The judges of the Supreme Court in New York, were divided in opinion on this case, but in the Court of Errors, Chancellor Kent gave an opinion, supported by an elaborate argument and examination of authorities, that the master's determination to go to Stockholm put an end to the risk, and, accordingly, that the insurers were not liable for any loss subsequent to that determination. The other judges concurred in this opinion.<sup>1</sup>

I cannot but doubt this decision. As the assured cannot have the benefit of his mere intents, not distinctly realized in acts, so he ought not to be prejudiced by them. In this case the new intent was just as subject to be revoked as the first one had been. The risk having once commenced, it is immaterial to the underwriters how many designs of turning to the right and left the master may have, so long as he is in fact on the direct route of any destination authorized by the policy. In determining whether the risk has or has not commenced, the ambiguous acts of the assured or of his agents must necessarily be construed according to the intention with which they are done; that is, whether in the prosecution of the voyage insured upon, or a different one; but when the right of the underwriter to retain the premium has once accrued, the assured is surely entitled to avail himself of the benefit of his contract, so long as he is actually within its conditions.

967. *The risk ends when the voyage is intercepted and broken up, although it is by a peril not insured against.*

Insurance was made "from New York to Bourdeaux, free from loss or detention, in consequence of prohibited trade." The vessel was prohibited to enter at Bourdeaux. Chief Justice Kent said: "The prohibition to enter, under the special provision in the policy, was equivalent to an actual termination of the risk by landing the goods."<sup>2</sup>

968. Insurance to a port and "*until the vessel shall have been there moored twenty-four hours in safety,*" presents the question, *What is being moored in safety?*

Under such a policy, on a voyage to London, the vessel arrived

<sup>1</sup> N. Y. Firemen's Ins. Co. v. Lawrence, 14 Johns. N. Y. 46.

<sup>2</sup> Speyer v. N. Y. Ins. Co. 3 Johns. N. Y. 88.

at the dock where she was to unload, and, there being no room on the inside, lay outside, moored and lashed to other vessels, and after so lying more than twenty-four hours was forced adrift by the ice, and lost. Lord Kenyon was of opinion, that she had been moored twenty-four hours in safety, as intended by the policy.<sup>1</sup> And this seems to have been a proper construction of the phrase, which must have reference to safety from hinderance by the elements and sea-perils, and not to the good or bad berth, or mooring-ground, the vessel might find in the port.

In the case of a vessel insured to London, that within twenty-four hours after her arrival was ordered back to quarantine, whereupon her crew deserted her, and she did not get into quarantine for eighteen days after, it was held that the risk continued during the quarantine, and consequently until she should have been moored twenty-four hours in safety, after the expiration of the quarantine.<sup>2</sup> In this case, the being moored in safety was considered to mean, so as to have "the opportunity of unloading."

A ship being insured to Havana, on arriving, was ordered to anchor under the Moro Castle, at the entrance of the harbor, because a frigate was about passing; and after the frigate had passed, it was too late to get the ship under way that day. On the next day, in crossing the harbor, and more than twenty-four hours after she had come to anchor under the castle, she struck on a shoal in the harbor. It was held in Louisiana, that she had not been moored twenty-four hours in good safety.<sup>3</sup>

A ship and freight were insured from Sierra Leone, "the ship until she should arrive at London, and be there moored at anchor twenty-four hours in good safety, and the goods until the same should be there discharged and safely landed." The ship brought a cargo of teak, which the master was directed to deliver at the King's Dock at Deptford. The ship arrived at Deptford, but was hindered by the ice in the river from entering the dock, and lay moored for some days, when, in the attempt to move her into the dock, she went ashore and was wrecked. Lord Tenterden and his associates considered that the being safely moored must

<sup>1</sup> *Angerstein v. Bell, Park, Ins.* 55. Mart. N. S. La. 637. See *Dickey v.*

<sup>2</sup> *Waples v. Eames*, 2 Strange, 1243. *United Ins. Co.* 11 Johns. N. Y. 358.

<sup>3</sup> *Zacharie v. Orleans Ins. Co.* 5



be understood in this case the being moored in the dock, as the usual place for discharging such a cargo.<sup>1</sup>

A vessel insured in like manner to Jamaica arrived at her port of destination and came to anchor there in tempestuous weather, and the gale continued until she lost both of her anchors, and was driven ashore and wrecked; but she had sustained no damage during twenty-four hours after coming to anchor. Parsons, C. J.: "The vessel is safe within the terms of the policy, until she suffers a loss insured against."<sup>2</sup>

969. *The risk on a vessel under a policy to a place generally without any provision as to her safety there, terminates on the vessel being safely anchored at her port of destination, in the usual place and manner.*<sup>3</sup>

The risk does not end until the ship can be moored in the usual place. A ship insured to Havana, came to anchor near the Moro Castle, at the entrance of the harbor, where all vessels are obliged to wait until they are visited by the health-officers and those of the custom-house. It is not, however, considered a place of safety, nor do vessels discharge their cargoes there. After remaining there more than one day, and before the ship had been visited or admitted to entry, she was wrecked. It was held, that the risk had not ended.<sup>4</sup>

970. *The risk on a cargo insured "till safely landed," will continue in lighters, where that is the usual mode of landing similar goods, or goods from vessels of like size.*<sup>5</sup>

And so goods insured "to and at,"<sup>6</sup> or "to" a place, are covered in lighters, where such is the customary way of landing similar goods,<sup>7</sup> unless the goods are previously taken in charge by the assured or consignee.

<sup>1</sup> Samuel v. Royal Exch. Ass. Co. 8 Barnw. & C. 119.

<sup>2</sup> Bill v. Mason, 6 Mass. 313.

<sup>3</sup> Ord. Louis XIV. Ins. a. 5; Code de Commerce, a. 152; Bill v. Mason, 6 Mass. 313; Lindsay v. Janson, 4 Hurlst. & N. Exch. 699.

<sup>4</sup> Dickey v. United Ins. Co. 11 Johns. N. Y. 358. See Zacharie v. Orleans Ins. Co. 5 Mart. n. s. La. 637.

<sup>5</sup> Sparrow v. Carruthers, 2 Strange,

1236; Hurry v. Royal Exch. Ass. Co. 2 Bos. & P. 430; 3 Esp. 289; Rucker v. London Ass. Co. 2 Bos. & P. 432, n.; Matthie v. Potts, 3 id. 23; Coggeshall v. American Ins. Co. 3 Wend. N. Y. 283.

<sup>6</sup> Parsons v. Mass. Fire & Mar. Ins. Co. 6 Mass. 197.

<sup>7</sup> Wadsworth v. Pacific Ins. Co. 4 Wend. N. Y. 33.

Goods destined to Soto La Marina, in Mexico, are usually discharged from the vessel into launches outside of the bar, sixty miles below the town, and transported up to the town in the launches, or landed and carried on mules. It was held, that in either case they are at the risk of the underwriters until they are landed.<sup>1</sup>

In the case of a policy on goods to the coast of Labrador, till safely landed, the vessel arrived on that coast the 22d day of June, and the crew were employed in fishing, except at short intervals while they were landing such parts of the cargo as were wanted, until the 13th of August, when the vessel, still having the principal part of her cargo on board, was captured by an American privateer. Lord Mansfield and his associates were of opinion, that there was not more delay than the usage of the trade justified. The risk had not expired, because the assured had not had more than the usual and reasonable time, according to the course of the trade, for landing the cargo.<sup>2</sup>

Goods being insured to the coast of Africa, "till safely landed," the vessel lay on the coast from the 6th of May till the 4th of June, waiting for a return cargo to come down from the country, as is customary; and while so waiting was captured by a French privateer. Lord Kenyon was of opinion, that the risk continued to the time of the capture, and refused to admit evidence that, by the usage in these voyages, the risk continued on the goods but twenty-four hours after the vessel was moored.<sup>3</sup>

It has been held, that the risk continues on goods brought back to the boat, in order to be again put on board of the ship, where they had been put on shore for the purpose of being delivered to a purchaser, such delivery not being made.

Insurance was made, upon "specie and merchandise out, and merchandise home, at and from Boston to ports in the islands of Sumatra and Java, for the purpose of disposing of the outward and procuring a return cargo, and thence to the port of discharge in the United States, with liberty to touch at the usual places and trade thereat." At Labouaga, in the island of Sumatra, the captain contracted with Dato Bassow, the chief magistrate there, to exchange a chest of opium for a certain quantity of pepper

<sup>1</sup> *Osacar v. Louisiana Ins. Co.* 5 Mart. n. s. La. 386.

<sup>2</sup> *Noble v. Kennoway*, Dougl. 492.

<sup>3</sup> *Parkinson v. Collier, Park, Ins.* 470.

and for dollars. When pepper, of a value equal to that of two thirds of the opium, had been delivered on board, Dato requested that the opium should be landed and weighed, and said he would pay the balance in dollars. The opium was accordingly landed. While they were occupied in weighing it, Dato demanded new terms of agreement, upon which the captain proposed to take the opium on board, and pay in dollars for the pepper which he had received. Dato consented to this proposition, but just as the opium had been put on board of the boat to be carried back to the ship, and while it rested on the gunwale of the boat, his men seized it, in pursuance of a previous design to plunder or cheat the captain. It was insisted, in behalf of the insurers, that the risk on the opium had ended, as soon as it was put into the scales to be weighed. Mr. Justice Sedgwick, for the court, said: "The insurers insured the plaintiff against the restraint and detention of princes, for the purpose of disposing of the outward and procuring a return cargo; and while executing this purpose, the property was violently seized. The goods were as much protected by the policy, in the boats, while employed as auxiliary to the voyage, as they were on board the ship."<sup>1</sup>

971. *A policy on goods till safely landed terminates on landing at the usual place of discharging cargoes at the port:*

As, in an insurance to Leghorn, the landing at the Lazaretto, about half a mile below the city.<sup>2</sup>

972. *Whether the risk on goods insured until twenty-four hours after they are safely landed will terminate on parts of the cargo successively landed, so soon as each part has been landed for that period?*

In a New York case under a policy on goods to Jamaica, "and twenty-four hours after the goods as named in the margin are landed," against illicit trade, among other risks, when a part of the cargo had been landed over twenty-four hours, the goods landed, and those still on board, were seized as illicit. Mr. Justice Lansing, giving the opinion of the court, said: "The insurance being entire, we are of opinion that the risk continued on

<sup>1</sup> Parsons v. Mass. Fire & Mar. Ins. Co. 6 Mass. 197. 75. See also Brown v. Carstairs, 3 Campb. 161.

<sup>2</sup> Gracie v. Marine Ins. Co. 8 Cranch,

the entire goods until twenty-four hours after ALL of them were landed." <sup>1</sup>

I do not hesitate to doubt this decision, and state it as the better doctrine, that *the risk terminates on each parcel at the end of twenty-four hours after it is landed.*<sup>2</sup>

973. *If the assured or consignee takes charge of the goods in lighters before they are landed, the risk ends, though by the policy it runs till they are safely landed.*<sup>3</sup>

974. Insurance being *on a ship and the cargo*, "*to terminate when she might receive on board a cargo or effects with the intention of proceeding to the United States,*" the risk was *held not to terminate on the ship's having received on board, from other ships a part only of her cargo.*<sup>4</sup>

#### SECTION III. SUSPENSION OF THE RISK.

975. We have already seen that the risk may be suspended during a temporary non-compliance with the implied warranty of seaworthiness.<sup>5</sup> It has, it is true, been occasionally asserted by judges, that the risk cannot be so suspended, and then revive, without an express provision in the policy for the purpose;<sup>6</sup> and this is implied in many cases, more particularly those involving the question of apportionment of premium. But the doctrine that the risk may be suspended and again revive without an express provision for the purpose, seems to be within the strictest juridical principles. The stipulation of seaworthiness, for instance, is an implied one, about which the parties are totally silent in their contract. When, therefore, the courts assume it to be part of the contract, they do so upon the ground of its being material, and there seems to be no reason for extending it further than it is so between the parties; and if in any subsequent stage of the voyage, or other term of the risk, the ship is seaworthy, it is

<sup>1</sup> *Gardiner v. Smith*, 1 Johns. Cas. N. Y. 141. See also *Fletcher v. St. Louis*. Mar. Ins. Co. 18 Mo. 193.

<sup>2</sup> So held in *Mansur v. New England Ins. Co.* 12 Gray, Mass. 520.

<sup>3</sup> *Strong v. Nattally*, 4 Bos. & P. 16; *Low v. Davy*, 5 Binn. Penn. 595.

<sup>4</sup> *Ward v. Wood*, 13 Mass. 539.

<sup>5</sup> *Supra*, c. 8, s. 2, No. 734.

<sup>6</sup> *Mackenzie v. Shedden*, 2 Campb. 431; and see 2 Caines Cas. N. Y. 72, per Lansing.



wholly immaterial that she was temporarily not so, at some prior time after the risk had begun. Jurisprudence abounds with decisions that, if this implied warranty is not complied with when the risk is to begin, so that it may commence within the terms of the policy, the contract is forfeited and void. But after it has begun, so that the premium is become due, it surely is but equitable that a temporary non-compliance should have effect only during its continuance. To carry it further is to inflict a penalty upon the assured, and decree a gratuity to the insurer, who is thus permitted to retain the whole premium when he has merited but part of it. A forfeiture certainly ought not to be extended beyond the grounds on which it is incurred.

The question then arises, whether the same doctrine is applicable to other implied stipulations than that of seaworthiness. I say "stipulations," for the accidental more frequent use of the terms "warranty" and "condition," in reference to seaworthiness, should not affect the essential principles by which the construction of the contract of insurance is to be governed. Because the leading early cases respecting warranties and conditions had reference to such as covered the whole subject-matter of the contract, and the whole risk, we are the more apt to assume that they have this application generally, which is by no means necessary, for nothing prevents a warranty or condition from applying to the diver parts of the subject or of the risk, when it can be so applied consistently with the nature of the contract. When, therefore, a warranty or condition is imposed by construction, as being implied and presupposed by the parties in making their contract, the extent to which it is to be applied, and the degree of forfeiture to be incurred by non-compliance, are surely proper subjects of consideration. And the case above referred to suggests a general rule on the subject, namely, that the forfeiture is to be extended only far enough to put the other party, that is, the insurer in this case, in the same condition as he would have been in had the stipulation been complied with. This rule will always operate in favor of the insurer, and against the assured, but only commensurately with the non-compliance on the part of the latter.

If this doctrine is fully carried out, it will apply to an implied warranty or condition other than that of seaworthiness, as, for

instance, that of neutral character and conduct, where the warranty is not complied with, and a loss happens by perils of the seas wholly independent of such warranty.

And there does not appear to be any good reason why, in the absence of all fraud and of all prejudice to the underwriter, the same doctrine should not be applicable to express stipulations in the nature of warranties, or conditions, unless, by the circumstances or the express provisions of the policy, such application is excluded.<sup>1</sup>

Thus, where a cargo is insured for a voyage, and, by construction of the policy, the risk is not covered while the goods are on land,<sup>2</sup> there is no reason why it should not revive when the cargo is again put on board the ship. In this and other cases, while the goods are not exposed to any of the perils insured against, either by not conforming to the description in the policy, or because they are, for a time, not exposed to such perils, the risk temporarily ceases, and recommences on the goods being again brought within the situation contemplated by the parties and described in the policy. The risk may not be so interrupted, when, by the action of the perils insured against, or for the due prosecution of the voyage, the subject-matter is put out of the condition in which the policy supposes it to be.<sup>3</sup>

Fire policies may contain a provision for a suspension of the risk in certain cases :

As in case of any certain hazardous trades being carried on in the insured building.<sup>4</sup>

The circumstances of an Ohio case seem to admit of this construction. A steamboat being insured for one year was seized and sold under a judgment upon a lien securing a debt due from a prior owner. The assured repurchased it, and it was subsequently lost within the year. There does not appear to have been any express stipulation that the policy should be void on a sale of the boat. It was held that the policy had been forfeited

<sup>1</sup> Such application will be excluded where the non-compliance enhances, or otherwise changes, the subsequent risks. *Pelly v. Royal Exch. Ass. Co.* 1 Burr. 341; *Ellery v. New England Ins. Co.* 8 Pick. Mass. 14.

<sup>2</sup> *Martin v. Salem Mar. Ins. Co.* 2 Mass. 420.

<sup>4</sup> *Grant v. Howard Ins. Co.* 5 Hill, N. Y. 10.

<sup>3</sup> *Bondrett v. Hentigg*, Holt, 149;

and become extinct by the sale. The boat seems to have been within all the conditions of the policy, excepting that, by reason of the sale and consequent temporary extinguishment of the insurable interest of the assured, the underwriters were, for the time, exonerated from liability, and so seem to have had the privilege of a proportional gratuity of the premium.

The case does not show any legal impediment to what was obviously the equitable construction of the contract, namely, that the risk was suspended.<sup>1</sup> There may have been some provisions of the policy or some circumstances not reported, though there seems to be a full statement of the case, and report of the arguments of counsel, and opinion of the court.

976. In case of a stipulation for a *return of premium* "*for every uncommenced* month if the ship should be laid up," which was in effect a stipulation for the suspension of the risk for such months, it was held that this might mean a permanent laying up, so as to put an end to the voyage on which the ship was employed.<sup>2</sup>

<sup>1</sup> Cockerill v. Cincinnati Ins. Co. 16 Ohio, 149.

<sup>2</sup> Hunter v. Wright, 1 Lloyd & W. Cas. 138; 10 Barnew. & C. 714.

## CHAPTER XII.

### DEVIATION AND CHANGE OF RISK.

SECT. 1. Of deviation and change of risk in general. The effect.

2. The substitution of an entirely other voyage.
3. Change of the risk in port. Time and manner of loading and landing cargo.
4. Varying unnecessarily from the usual course.
5. Intention to deviate.
6. Delay after the risk has begun, either in port or on a passage.
7. Usage will justify deflections and delay of the voyage.
8. Liberty to turn from the direct or usual course, or to delay, or to vary from the usual risks.
9. Turning off and delay for repairs or to refit

SECT. 10. Turning off to avoid perils insured against, or not insured against.

11. Delay for the purpose of succoring the distressed, or to save the property of others.
12. Taking letters of marque. Cruising. Convoying.
13. Departures from the route, delays, and changes of the risk, not imputable to the assured.
14. Changes of the risk in fire policies.
15. Changes of the risk in life policies.
16. Waiver of a forfeiture incurred by deviation.

#### SECTION I. OF DEVIATION AND CHANGE OF RISK IN GENERAL. THE EFFECT.

977. HAVING, in the preceding chapters, considered the conditions and stipulations relative to the voyage or other risk, and the limits or period of the risk, we now come to inquire in what manner the voyage is to be pursued or any other risk is to be run, and what acts will be a departure from it, or DEVIATION, which is *the enhancing or varying from the risks insured against as described in the policy, without necessity or just cause, after the risk has begun.*<sup>1</sup>

978. *The doctrine of deviation has reference exclusively to the risks insured against in the policy.*

<sup>1</sup> See Marshall, Ins. 183 ; 1 Arnould, 447, for definitions of deviation, and Ins. 341 ; Roccus, n. 52 ; Dougl. 291 ; remarks upon it.  
Coffin v. Newburyport Ins. Co. 9 Mass.



Other risks may be incurred, provided it appears by the policy that they are to be so, and the contract will not be thereby affected, though the risks insured against are thereby affected. So, extraordinary and unusual risks to any extent, of which the underwriters cannot be presumed to have notice, may be incurred by the assured, provided those insured against are not thereby affected; and the loss, if any, by such superadded risk, is clearly distinguishable:

As by omitting to take a sea-letter, in case of its not being requisite to compliance with an express stipulation:<sup>1</sup>

So in case of the risks under the policy being suspended for the time.<sup>2</sup>

979. The description of the risks insured against in the policy, and referred to in speaking of a deviation or change of risk, are those specified as perils of the seas, fire, capture, detention, &c., on a certain voyage or for a certain period. It is material, accordingly, not only to understand what species of perils are insured against under the description in the policy, but also within what time, on what course or track, within what geographical limits, and under what circumstances and qualifications, the underwriters stipulate to assume such risks, since *the enhancing of the risks thus assumed, or varying from them, discharges the underwriters on a policy or lender on bottomry or respondentia, partially, temporarily, or absolutely, from their liability for loss.*<sup>3</sup>

*The language describing the course of the voyage must be taken in its commercial acceptance, and not in its strict geographical meaning.*

A ship, of which the freight was insured from Van Diemen's Land to India and the "Indian Islands," and thence to Europe, put into the island of Mauritius. Though this is, geographically, an African island, yet it was held, that if, in commercial language, it was an "Indian island," it was not a deviation.<sup>4</sup>

<sup>1</sup> *Cleveland v. United Ins. Co.* 8 Mass. 308. See also *Richardson v. Maine Ins. Co.* 6 Mass. 102. tomry, see *Marshall, Ins.*, book 2, c. 5, p. 756, 2d ed., also *Western v. Wildy, Skin.* 152.

<sup>2</sup> See *supra*, c. 11, s. 3.

<sup>4</sup> *Robertson v. Clarke*, 1 Bingham 445;

<sup>3</sup> As to the effect of deviation in bot- 8 Moore, 622.

980. After the explicit provisions of the policy, *usage is the predominating test as to deviation* and change of the risk.

Thus usage has been held to justify a whaling vessel in entering into a "mateship," as it is termed ; namely, an agreement to share catchings.<sup>1</sup>

A vessel may stop at usual places for landing and taking in passengers and goods, or for other purposes, especially in river or coasting passages, whether under a policy of insurance,<sup>2</sup> or a bill of lading.<sup>3</sup>

981. *By a "VOYAGE" is generally understood the sailing from one port to another with all practicable, safe, and convenient expedition ;* this being the usual way in which a voyage is performed.

In some voyages, however, it is customary to prolong the risk by touching at intermediate ports, as in India voyages, or others of great length, or by delaying to discharge the cargo immediately after arrival, as in voyages to the coast of Labrador or of Africa ; and the parties are supposed to be acquainted with such custom, and have it in contemplation when they make their contract. The meaning of the parties is therefore presumed to be, that the voyage is to be pursued in the most direct and safe course, and the adventure conducted, in general, in the most expeditious manner, as far as is consistent with safety ; and if there is any departure from such course or mode of conducting the adventure, whereby the risks insured against are varied or increased, it behooves the assured to justify such departure by showing either a usage in that respect, or a reasonable necessity for it.

Any usage as to the course or mode of pursuing a voyage, or any variation from the usual manner of pursuing and conducting it rendered necessary and authorized under the policy by the circumstances, thereupon becomes a part of the voyage to the same effect as if expressly provided for, and the construction as to any subsequent deviation or change of risk will be the same as if such prior justifiable deviation had been expressly so provided for.<sup>4</sup>

<sup>1</sup> Child v. Sun Mutual Ins. Co. 3 Sandf. N. Y. 26.

<sup>2</sup> Lockett v. Merchants' Ins. Co. 10 Rob. La. 339.

<sup>3</sup> Lowry v. Russell, 8 Pick. Mass. 360.

<sup>4</sup> Harrington v. Halkeld, Park, Ins. 639, 8th ed.

982. *The propriety of changes of risk, delay, and departure from the direct or usual course, from alleged expediency, is to be tested, not by the event, but by the circumstances as they presented themselves to the assured or his agent at the time, acting in good faith and having in view the expeditious and safe prosecution of the voyage and safety of the property at risk.*<sup>1</sup>

In case of the course and steps being so taken, the underwriters will be liable for loss by the perils specified in the policy as being insured against, though the loss is directly consequent upon the measures taken for safety:

As where a damaged boat was sunk, in consequence of being taken in tow, at the request of the master, by a steamboat.<sup>2</sup>

So Lord Ellenborough ruled, that taking three Spanish prisoners of war on board of a merchant-vessel as passengers, on a voyage from the Cape of Good Hope to Buenos Ayres, did not discharge the underwriters, unless there was reason to suppose, at the time of taking them on board, that the risk would be thereby materially enhanced, which he intimated that there was not,<sup>3</sup> though they joined some of the crew and seized the vessel in coming into the River Plate.

983. *It is not necessary to a deviation or change of risk, whereby the underwriters are discharged, that the degree or period of the risk should be thereby increased. The assured has no right to substitute a different risk.*<sup>4</sup>

Transshipping goods insured by a particular vessel, to another, unnecessarily, is a change of the risk which discharges the insurers.<sup>5</sup> So also it discharges the lender at respondentia from the risk.<sup>6</sup>

Under liberty to "touch at the Cape De Verde Islands, for the purchase of stock, such as hogs, goats, and poultry, and taking

<sup>1</sup> *Byrne v. Louisiana State Ins. Co.* 7 Mart. N. S. La. 124, per Porter, J.; also *Gazzam v. Ohio Ins. Co.* Wright, Ohio, 202.

<sup>2</sup> *Stewart v. Tennessee Ins. Co.* 1 Humph. Tenn. 242.

<sup>3</sup> *Toulmin v. Inglis*, 1 Campb. 421.

<sup>4</sup> *Hartley v. Buggin*, 3 Dougl. 39; *Hand v. Raynes*, 4 Wheat. 204; and see cases passim.

<sup>5</sup> *Millar, Ins.* 394; 1 *Emerigon*, p. 425, c. 12, s. 16; 1 *Burr.* 361; *Molloy*, c. 7, s. 11; *Oliverson v. Brighman*, 8 Q. B. 781; *Bold v. Rotheram*, id. 797; *Salisbury v. Marine Ins. Co. of St. Louis*, 23 Mo. 553. But this rule may be controlled by a privilege to transship. *Fletcher v. St. Louis Mar. Ins. Co.* 18 Mo. 193.

<sup>6</sup> *Code de Commerce*, a. 324.

in water," the taking in of four bullocks and as many asses, was held by the Supreme Court of the United States to be a variation of the risk whereby the underwriters were discharged, although the jury found that no delay was occasioned, and the navigation of the ship was not thereby embarrassed.<sup>1</sup>

984. *The doctrine of deviation has reference to voluntary acts, or to neglects, and not to unavoidable interruptions of the voyage;*

Such as the vessel being driven from the course in a storm ;

Or being taken possession of by a mutinous crew.<sup>2</sup>

But in case of a master of a vessel going out of harbor by order of the captain of a frigate lying near, to examine a strange sail, Lord Ellenborough ruled it to be a deviation, remarking that, if he had gone by compulsion, and under threat or just fear of violence, it would not have been so.<sup>3</sup>

985. *The exposure of the goods in a greater degree to the perils of the sea by stowing them on deck, is an enhancement of the risk whereby the underwriter upon them is discharged during their being so carried, unless he has notice from the nature of the article as specified in the policy, or the usage of the navigation, that they are to be carried in that manner.*<sup>4</sup>

Where the carrying of goods on deck does not impede the navigation of the vessel, it is not a change of the risk under a policy upon the vessel;<sup>5</sup> nor under one upon the rest of the cargo under deck; nor upon the goods under deck insured in the same policy.<sup>6</sup>

<sup>1</sup> Maryland Ins. Co. v. Le Roy, 7 Cranch, 26. See remarks upon this case by Marshall, C. J., in Hughes v. Union Ins. Co. 3 Wheat. 159. In what way the court considered the risk to be varied, other than in those negatived by the jury, does not appear; and, therefore, the case is of no authority except to the doctrine of all the cases, that the underwriters are discharged by an unnecessary change of the risk.

<sup>2</sup> Elton v. Broden, 2 Strange, 1264; and see Driscoll v. Bovil, 1 Bos. & P. 313; and Driscoll v. Passmore, id. 200.

<sup>3</sup> Phelps v. Auldjo, 2 Campb. 350.

<sup>4</sup> See supra, No. 460, and cases there cited. Brooks v. Oriental Ins. Co. 7 Pick. Mass. 259; Blackett v. Royal Exch. Ass. Co. 2 Crompt. & J. Exch. 244; Greery v. Holley, 14 Wend. N. Y. 35; and 2 Valin, p. 203, Ins. a. 13, n. and 1 id. p. 397, tit. Du Capitaine, a. 12, n.; The Calisto, Dav. Dist. Ct. 29; Lapham v. The Atlas Ins. Co. 24 Pick. Mass. 1.

<sup>5</sup> Lapham v. The Atlas Ins. Co. 24 Pick. Mass. 1; Milward v. Hibbard, 3 Q. B. 120.

<sup>6</sup> Adams v. Warren Ins. Co. 22 Pick.



986. *A voyage is commonly characterized in part by its implied or expressed object, as mercantile, cruising, or fishing, and particular limits or species of either, and it will be a different voyage or a deviation to go for another object, or out of the local limits specified, or on a different species of the same general pursuit.*<sup>1</sup>

987. *The doctrine of deviation is applicable to river and lake navigation:*<sup>2</sup>

As in case of a steamboat taking other boats in tow, where there is no usage so to do in like circumstances.<sup>3</sup>

988. *The borrower on bottomry is affected by the doctrine of deviation no less than the assured in a policy.*<sup>4</sup>

989. *The effect of a deviation, as in the case of unseaworthiness,*<sup>5</sup> *if temporary, without subsequently affecting the risks insured against, is to suspend the risk; or, if in consequence of the deviation the risks insured against are affected and changed during the remaining period of the policy, the effect is to discharge the underwriters from liability for any subsequent loss;*<sup>6</sup> *but they still remain liable for a prior one.*<sup>7</sup>

It has been said, that a delay of an hour or deviation of a mile discharges the underwriters,<sup>8</sup> but the law does not regard such inconsiderable circumstances; it is satisfied with reasonable diligence and despatch.

Mass. 163; *Lapham v. Atlas Ins. Co.* 24 id. 1.

<sup>1</sup> See *Child v. Sun Mut. Ins. Co.* 3 Sandf. N. Y. 26.

<sup>2</sup> *Gazzam v. Ohio Ins. Co.* Wright, Ohio, 202; *Jolly's Ex'rs v. Ohio Ins. Co.* 1 id. 539.

<sup>3</sup> *Hermann v. Western Mar. & Fire Ins. Co.* 15 La. 517.

<sup>4</sup> *Harman v. Vanhattan*, 2 Vern. Ch. 717; *Western v. Wildy*, Skin. 152; *Williams v. Stedman*, id. 345; *Holt*, 126.

<sup>5</sup> *Supra*, No. 734.

<sup>6</sup> *Green v. Young*, 2 Salk. 444; *Richardson v. Maine Ins. Co.* 6 Mass. 121; *Lee v. Gray*, 7 Mass. 352; *Coffin v. Newburyport Ins. Co.* 9 Mass. 447; *Merchants' Ins. Co. v. Algeo*, 32 Penn. St. 330.

<sup>7</sup> *Hare v. Travis*, 7 Barnew. & C. 14.

<sup>8</sup> *Coffin v. Newburyport Ins. Co.* 9 Mass. 449.

## SECTION II. THE SUBSTITUTION OF AN ENTIRELY OTHER VOYAGE.

990. There is an important *distinction between the substitution of another entire voyage at the outset, and a change of the risk after the voyage is begun.*

In the former case the contract does not take effect, and the premium may be reclaimed, where the contract is made through mistake and without fraud, and the insurer could have defended himself against a claim for loss; in the latter case the contract takes effect partially, and the premium is not reclaimable.

The circumstances under which the risk will commence, under a policy upon the different insurable subjects, have already been considered.<sup>1</sup> We have seen that the policy "at" a place attaches when one "from" it would not, and the same policy on ship, cargo, and freight, may attach on the ship, and not on the other interests.

991. Though the ship is at the place where the risk is to begin, or sails from the port of departure specified in the policy, *the policy will not attach if another entirely different voyage is intended.*<sup>2</sup>

This may happen by reason of mistake in describing the risk, or the distance and misunderstanding between the assured and his agent for effecting the insurance or having charge of the subject insured.

992. *In case the vessel or other interest insured is at the place "at" which the risk under the policy is to begin, but is fitting out or loading for another port of destination than that named in the policy, or in case a vessel insured "from" a place sails from such place for another port of destination, there being no intention to proceed to that named in the policy, where the course of a voyage to the two is the same for some distance, the voyage or risk actually begun is a different one from that insured upon, provided the intention of proceeding on such other voyage is so manifested*

<sup>1</sup> Supra, c. 11, s. 1.

Cours de Droit Com. Vol. III. p. 414,

<sup>2</sup> See *Sellar v. M'Vicar*, 4 Bos. & P. tit. 10, s. 9; *Emerigon*, Vol. II. p. 47, 23; supra, No. 920; *Boulay Paty*, c. 13, s. 10.

by the assured or his agents, that the underwriters have good means of proving it.<sup>1</sup>

In case of positive orders to take the most northern of two different courses from a certain point, on a voyage from London to Jamaica, for the purpose of landing some stores at Cape Nicola Mole, in St. Domingo, instead of leaving the election to be made by the master at the dividing point, as was usual on that voyage, no notice of such order being given to the underwriters, Lord Kenyon, C. J., and Ashhurst, J., and Grose, J., considered the case to be one of concealment. Lawrence, J., considered it to be one of deviation,<sup>2</sup> that is, the substitution of another voyage from the branching point, because it did not appear that the master had, in fact, voluntarily taken the northern course at the branching point from preference. Mr. Arnould considers this to be a different voyage at the outset.<sup>3</sup> But his references do not appear to me to support such a construction.<sup>4</sup>

A cargo being insured "from New York to St. Andero," in Spain, the vessel cleared and sailed for Hamburg, and the goods were shipped for that port, which, from the whole evidence, appeared to be her destination. On arriving off Cape Ortegal, on account of the season being unfavorable for proceeding to Hamburg, she was proceeding towards St. Andero to put in there

<sup>1</sup> See *Marsden v. Reid*, 3 East, 572; and see *Palmer v. Marshall*, 8 Bingham, 79; *Palmer v. Fenning*, 9 id. 460, *Wooldridge v. Boydell*, Dougl. 16.

<sup>2</sup> *Middlewood v. Blakes*, 7 Term, 162, stated more fully *supra*, No. 582. See also *Carter v. Royal Exch. Ass. Co.* 2 Strange, 1249, and 2 Duer, Mar. Ins. 491.

<sup>3</sup> Vol. I. p. 33.

<sup>4</sup> They are *Boulay Paty*, Cours de Droit Com. tit. 10, s. 9, and *Emerigon*, Vol. II. p. 47, c. 13, s. 10. The instances given as those of a different voyage are of a different port of destination of the cargo. *Emerigon*, in his awards reported by him, put the claims for loss and that for a return of premium as alternatives to each other, which they

certainly should be in respect to the present inquiry. It seems to me to be a mere intention to deviate until arrival at the branching point. So Mr. Justice Lawrence considered it, for he thought that a loss before coming to the branching point would have been recoverable. The actual destination was to the terminus ad quem specified in the policy, and the proposed touching at Cape Nicola Mole was for the incidental purpose of delivering some stores there, which constituted no considerable part of the cargo. I do not see how the case can be distinguished from any other of an originally intended deviation from the course of the specified voyage, or unjustifiable delay, or other originally intended forfeiture of the policy.

and wait for a more favorable time to resume her voyage to Hamburg, when she was captured. It was held by Lewis, C. J., and Radcliff, J., of the Supreme Court of New York, that the voyage insured had never commenced, and that the premium should be returned.<sup>1</sup>

A different doctrine was intimated in another New York case by Livingston, J., giving the opinion of the court,<sup>2</sup> and by Lansing, Chancellor, in the Court of Errors,<sup>3</sup> respecting a vessel insured from Barcelona, in Spain, to Baltimore, and a loss at Barcelona, the vessel being alleged to have been destined to Havana. The better doctrine is, however, as above stated.

So a vessel insured from Akyab to a port of discharge in Great Britain, sailed from Akyab to Queenstown or Falmouth, at captain's option, for orders to discharge at a port in Great Britain or on the continent. On arrival at Falmouth she received orders to go to Antwerp and was lost on the Isle of Wight. The course up to the time of loss was the same as that required to go to the eastern ports of Great Britain. The court held that this was a substitution of a new voyage, and not an intention to deviate. The right of choice was taken from the ship from the beginning, and an obligation to make a different voyage assumed before leaving Akyab. The new voyage was held to commence at Falmouth.<sup>4</sup>

The fact of a different terminus ad quem of the voyage from that specified in the policy is material in this inquiry :

As in case of a vessel insured "at and from Maryland to Cadiz," which was fitted out and loaded, and sailed for another port of destination.<sup>5</sup>

A ship being insured "at and from 20th October from any ports in Newfoundland to Falmouth, in England," in continuation of a previous policy, had left a port of Newfoundland on the 1st, and fished on the Banks until the 7th, and then sailed for England, and was lost. Buller, Ashhurst, and Grose, Justices, decided that she was not on the voyage insured, on account of

<sup>1</sup> Forbes v. Church, 3 Johns. Cas. N. Y. 159.

<sup>3</sup> Smith v. Steinbach, 2 Caines, Cas. N. Y. 158.

<sup>2</sup> Steinbach v. Columbian Ins. Co. 2 Caines, N. Y. 132.

<sup>4</sup> Merrill v. Boylston Ins. Co. 3 All. Mass. 247.

<sup>5</sup> Wooldridge v. Boydell, Dougl. 16.



not having sailed on the voyage described in the policy from Newfoundland to England, but from the former place to the Banks.<sup>1</sup>

The terminus a quo of the RISK in this case was the 20th October; that of the VOYAGE was a port of Newfoundland. Mr. Justice Buller says, that it is not necessary under such a policy that the vessel "should be in port when it attaches, but she must have sailed on the voyage insured." The case turns upon this last proposition, which is plainly erroneous. What does it import where the vessel has been, or sailed from or to, before the risk attaches? If she is then within the terms of the policy, that is to say, if she is on the specified voyage, as the vessel in this case confessedly was, the terms of the description are satisfied. Her being early or late in respect of the season, may render such a description an implied misrepresentation, if her being so is material; but as Mr. Justice Buller himself implicitly says, in his words just quoted, that is of no importance in identifying the voyage.

Accordingly, a direct contrary decision has been made in Massachusetts.<sup>2</sup>

Courts have made the termini the criterion of identity and diversity in respect of wages. These are important characteristics in insurance between local termini, but not applicable to time policies, and in voyage policies there may be different descriptions of voyages between the same termini, by reason of the employment of the vessel or objects of the voyage being different.<sup>3</sup> The question of identity in respect to voyages will sometimes be difficult to jurisconsults, as it is to casuists and metaphysicians in other cases; but where the rights and interests of persons are concerned, the propriety of cutting the knot by some inflexible arbitrary rule is very questionable, though it may alleviate juridical labor and responsibility. Though the local termini are important

<sup>1</sup> *Way v. Modigliani*, 2 Term, 30. This decision is put by Mr. Justice Buller upon the authority of *Wooldridge v. Boydell*, but in that case the vessel did not sail for the port of destination to which she was insured.

<sup>2</sup> *Martin v. Fishing Co.* 20 Pick. Mass. 389; *supra*, No. 928. See also

*Manly v. United Mar. & Fire Ins. Co.* 9 Mass. 85, *supra*, No. 928; and *Kent v. Manufacturers' Ins. Co.* 18 Pick. Mass. 19; *supra*, No. 928.

<sup>3</sup> See remark of Thompson, J., giving the opinion of the court, *Marine Ins. Co. v. Tucker*, 3 Cranch, 357.

characteristics in deciding on the identity or diversity of the voyage insured and that actually undertaken, I cannot think that there is good ground for the doctrine that this is an indispensable criterion.

993. *Sailing on the track to the specified port of destination with an intention conditionally to proceed to that or another port, at some certain stage of the voyage, according to the intelligence then received, is an inception of the voyage insured.*<sup>1</sup>

994. *The clearing for a port different from that to which the ship is insured, and for which it actually sails, does not make the voyage another than that insured.*<sup>2</sup>

995. *If the ship is not AT, or does not proceed FROM, the place at or from which it is insured, within a reasonable time, though it may be there or sail thence subsequently, the actual risk or voyage will be another than the one agreed for by the policy.*<sup>3</sup>

A ship being insured, February, 1824, from "Batavia and Singapore, to her port of discharge in Europe," had sailed from London, September, 1823, and owing to unnecessary delay did not arrive at Singapore until March, 1825. It was held by Tindal, C. J., and his associates of the English Common Pleas, that the policy did not attach.<sup>4</sup>

#### SECTION III. CHANGE OF THE RISK IN PORT. TIME AND MANNER OF LOADING AND LANDING CARGO.

996. *A change of the risks insured against, whereby the underwriters will be discharged from subsequent liability, may be made at the port of departure or other place where the risk begins, after it has begun, no less than at subsequent stages.*<sup>5</sup>

A ship insured "during one month's remaining in Portsmouth harbor, securely moored," was removed twice, which was ob-

<sup>1</sup> *Heselton v. Allnutt*, 1 Maule & S. 46.

<sup>2</sup> *Henkle v. Royal Exch. Ass. Co.* 1 Ves. Ch. 317; *Barnewall v. Church*, 1 Caines, N. Y. 217; *Talcot v. Marine Ins. Co.* 2 Johns. N. Y. 130; *Planchè v. Fletcher*, Doug. 238.

<sup>3</sup> *Courtney v. Mississippi Fire & Mar. Ins. Co.* 2 La. 233; *supra*, No. 923.

<sup>4</sup> *Mount v. Larkins*, 8 Bingh. 108.

<sup>5</sup> *Taylor v. Lowell*, 3 Mass. 331; *Merchants' Ins. Co. v. Clapp*, 11 Pick. Mass. 56.

jected to as changing the risk; but Lord Ellenborough said, "The terms of the policy warranted a removal within the harbor."<sup>1</sup>

997. *The mere specification of the voyage includes the usual place and mode of putting on board and landing the cargo :*

As taking a part of it inside, and the remainder outside, of a bar at Oporto:<sup>2</sup>

Taking goods on board in boats:<sup>3</sup>

Discharging hides in lighters at New York:<sup>4</sup>

Discharging goods into a store-ship at Gibraltar, being an intermediate port, instead of landing them.<sup>5</sup>

998. *Goods being insured until landed, any unusual and unreasonable delay in landing them has the effect of a deviation.*<sup>6</sup>

It is usual, in some trading voyages, to keep goods on board until they are sold, and in fishing voyages to keep the outward cargo on board for consumption;<sup>7</sup> and the goods are accordingly protected by the policy while kept on board in port in conformity to such usage, or to the necessities or convenience of the voyage.

999. *Where the vessel is in port for repairs or orders, or any other purpose than trading, or landing or taking in cargo, it is not a change of the risk whereby the insurers are discharged, to trade or land or take on board goods, if no delay or enhancement of the risk is occasioned thereby.*<sup>8</sup>

<sup>1</sup> ——— *v. Westmore*, 6 Esp. 109. <sup>8</sup> *Paine v. Columbian Ins. Co.* 2 Johns. N. Y. 264; *Raine v. Bell*, 9 East, 195; *Delaney v. Stoddart*, 1 Term, 22; *Gilbert v. Redshaw*, Marshall, Ins. 208; *Kingston v. Girard*, 4 Dall. 274; *Coggeshall v. American Ins. Co.* 3 Wend. N. Y. 283; *supra*, No. 940.

<sup>2</sup> *Kingston v. Knibbs*, 1 Campb. 508, n.

<sup>3</sup> *Coggeshall v. American Ins. Co.* 3 Wend. N. Y. 283; *supra*, No. 940.

<sup>4</sup> *Wadsworth v. Pacific Ins. Co.* 4 Wend. N. Y. 33. See also *Coggeshall v. American Ins. Co.* 3 Wend. N. Y. 283.

<sup>5</sup> *Tierney v. Etherington*, stated by Lord Mansfield, 1 Burr. 348.

<sup>6</sup> *Parkinson v. Collier*, Park, Ins. 470. See Dougl. 510.

<sup>7</sup> *Noble v. Kenoway*, Dougl. 492; and *Lord Ellenborough* ruled against *Vallance v. Dewar*, 1 Campb. 503; *Ougier v. Jennings*, id. 505.

<sup>8</sup> *Paine v. Columbian Ins. Co.* 2 Johns. N. Y. 264; *Raine v. Bell*, 9 East, 195; *Delaney v. Stoddart*, 1 Term, 22; *Gilbert v. Redshaw*, Marshall, Ins. 208; *Kingston v. Girard*, 4 Dall. 274; *Kane v. Columbian Ins. Co.* 2 Johns. N. Y. 264; *Cormack v. Gladstone*, 11 East, 347; *Laroche v. Oswin*, 12 East, 131; *Hughes v. Union Ins. Co.* 3 Wheat. 159. A different doctrine has been stated in a few instances, per Lord Kenyon, *Stitt v. Wardell*, Park, Ins. 438; 2 Esp. 610; which Sir James Mansfield said was a sudden answer by Lord Kenyon to a sudden question, 1 Taunt. 456; and Lord Ellenborough ruled against taking in cargo, though without delay, and when the vessel had leave to dis-

The adopting of a mode of repairing recently come into frequent use, and not a mere first experiment, is not a change of the risk in port equivalent to a deviation :

As hauling up a vessel on a marine railway, early after that mode of repairing was introduced, and when it had become frequent.<sup>1</sup>

#### SECTION IV. VARYING UNNECESSARILY FROM THE USUAL COURSE.

1000. *Unnecessarily or without sufficient reason going off the usual course of the voyage, if there be such, or, otherwise, what the master deems the most direct or expeditious, safe, and convenient course, is a deviation :*

As on a passage from Dartmouth to Liverpool, putting into Loo, which vessels on that passage usually pass without putting in :<sup>2</sup>

Or into Dover on a voyage from Dunkirk to Leghorn :<sup>3</sup>

Or going outside of Long Island in a voyage from New York to Norwich, instead of waiting until the usual track through the Sound should be open, the same having been obstructed by ice at the time, unless justified by usage.<sup>4</sup> But if this were considered to be an extraordinary emergency, and the going outside on that course were taken in good faith as the best way of prosecuting the voyage, it would be justified, and not a deviation.

In river navigation the vessel is not confined to the most frequented route.<sup>5</sup>

Under a policy on a vessel from a "port" in North America to Liverpool, it was held to be a deviation, after loading partly at Cockagne, in New Brunswick, to take the remainder of the cargo at Bouctouche, seven miles distant and farther from Liverpool, the custom-house of each port being subject to that of St. John's.<sup>6</sup>

charge, *Sheriff v. Potts*, 5 Esp. 96. But these cases have been overruled by *Raine v. Bell*, supra, as expressly stated by Lord Ellenborough, in *Laroche v. Oswin*, 12 East, 131.

<sup>1</sup> *Ellery v. New England Mar. Ins. Co.* 8 Pick. Mass. 14.

<sup>2</sup> *Fox v. Black, Park, Ins.* 488.

<sup>3</sup> *Townson v. Guyon, Park, Ins.* 438.

<sup>4</sup> *Crosby v. Fitch*, 12 Conn. 410.

<sup>5</sup> *Fireman's Ins. Co. v. Powell*, 13 B. Monr. Ky. 311.

<sup>6</sup> *Brown v. Tayleur*, 4 Ad. & E. 241 ;  
5 Nev. & M. 472.



It is not a deviation to go off the course from necessity, for the purpose of the voyage and the safety of the lives and property on board, as will subsequently more fully appear.<sup>1</sup>

By whatever stipulation or necessity a departure from the usual track to touch at any place is justified, the master must follow the usual, or most direct, convenient, and safe course from such place towards the ulterior destination.<sup>2</sup>

#### SECTION V. INTENTION TO DEVIATE.

1001. *An intention to deviate from a voyage or risk once begun, has no effect until something is voluntarily done in pursuance of such intention whereby the risk is actually changed.*<sup>3</sup>

In other words, if the intention is to change the whole voyage or risk, it is another voyage; if only a part of it subsequent to its commencement, this is an intention to deviate. The distinction is, as we shall see, not free from subtilty and difficulty, and at the same time it is important, since, whatever doctrine or construction is adopted, it must involve the alternative of a claim for a loss or a return of the premium; and the rule must operate consistently in the different cases of the fortunate and unfortunate result of the voyage, so far as loss by the perils insured against is concerned.

So long as the intention in doing acts in preparation for a voyage, or prosecuting it, is mixed with an intention of beginning it and subsequent deviation, the risk will commence and run.<sup>4</sup>

That a mere intention to deviate is not of itself a deviation has always been the received and undisputed doctrine, and is nothing more than the assertion of a principle that is common to this and other branches of jurisprudence: <sup>5</sup>

<sup>1</sup> *Campbell v. Williamson*, 2 Bay, So. 14; *M'Fee v. South Carolina Ins. Co.* 2 C. 237; and see *infra*, s. 7, 8, 9, 10, *M'Cord*, So. C. 503; *Thompson v. Barker*, 1 Root, Conn. 64; 1 *Arnould*, Mar.

<sup>2</sup> *Clark v. United Mar. & Fire Ins. Co.* 7 Mass. 365; *Guibert v. Readshaw*, Ins. 345; *Winter v. Delaware, &c. Ins. Co.* 30 Penn. St. 334.

*Park*, Ins. 454; *Neilson v. Columbian Ins. Co.* 3 Caines, N. Y. 108; 1 *Johns.* 46.

N. Y. 301; *Lavabre v. Walter*, and same *Plff. v. Wilson*, Dougl. 271. <sup>4</sup> *Heselton v. Allnutt*, 1 *Maule & S.*

<sup>5</sup> *Hogg v. Horner*, Park, Ins. 444; *Bain v. Kippen*, Millar, Ins. 445; *Bynk. Quæes. Jur. Priv.* l. 4, c. 3.

As in case of an intention to deliver some salt at Falmouth, taken to be delivered there, on a voyage from Carolina to Lisbon, and thence to Bristol, and capture on the common course to both Bristol and Falmouth: <sup>1</sup>

And that of insurance "from Honduras to London," where the master took goods to be delivered at Amsterdam, and loss before turning off: <sup>2</sup>

And that of instructions and an intention to touch at Cork on a voyage from Grenada to Liverpool, and loss before turning off: <sup>3</sup>

And that of an intention, on a voyage from Heligoland to Memel, to go off the course to Gottenburg for advice whether to proceed to Memel or Anhalt, and while on the common course to both Memel and Gottenburg, being driven by a gale under the batteries of Shegan and captured: <sup>4</sup>

And that of an intention, on a voyage "at and from Newry, in Ireland, to New York," to land passengers at Halifax, in Nova Scotia, taken on board to be there landed, and loss by striking on a rock in proceeding down the Irish Channel on the common course to Halifax and New York: <sup>5</sup> <sup>4</sup>

And that of taking goods to be delivered at Baltimore, intending to touch there to deliver them on a voyage "at and from Kingston, in Jamaica, to Alexandria, in Virginia," and capture on the common route to the two places: <sup>6</sup>

So being driven by necessity into Weymouth, where the master had intended to have touched independently of any such necessity, on a voyage from Cork to London, was held not to be a deviation, because nothing had been voluntarily done in pursuance of such intention. <sup>7</sup>

A parallel case was similarly decided in Massachusetts, where the master was compelled by stress of weather to put into Martha's Vineyard, where he intended to stop to deliver goods taken

<sup>1</sup> Per Lee, C. J., and his associates, *Foster v. Wilmer*, 2 Strange, 1249; and see *Thellusson v. Fergusson*, Dougl. 346, per Lord Mansfield.

<sup>2</sup> *Carter v. Royal Exch. Ass. Co.* 2 Strange, 1249.

<sup>3</sup> *Kewley v. Ryan*, 2 H. Blackst. 343.

<sup>4</sup> *Heselton v. Allnutt*, 1 Maule & S. 46.

<sup>5</sup> *Henshaw v. Marine Ins. Co.* 2 Caines, N. Y. 274.

<sup>6</sup> *Marine Ins. Co. v. Tucker*, 3 Cranch, 357.

<sup>7</sup> *Kingston v. Phelps, Peake*, 227.

to be delivered there, under a policy "from Boston to Charleston."<sup>1</sup>

The doctrine conclusively established in the cases above referred to has been departed from in a few instances.<sup>2</sup>

In case of insurance from North Carolina to Falmouth, in England, the master shipped part of his crew and cleared for New York, intending there to ship other seamen and proceed thence to Falmouth; and a loss occurred before turning off from the course to Falmouth, it was held in New York, by Lansing, C. J., and Kent and Lewis, Justices, to be a different voyage from the one insured.<sup>3</sup> I cannot, however, but think, that, on the authority of the cases above referred to, this was, at the time of the loss, a mere unexecuted intention to deviate.

SECTION VI. DELAY AFTER THE RISK HAS BEGUN, EITHER IN  
PORT OR ON A PASSAGE.

1002. *Unusual and extraordinary delay in the prosecution of a voyage, and prolongation of its period, without necessity or just cause, after the risk has begun, is a deviation.*<sup>4</sup>

The mere length of time is not the criterion. The necessity, and motives, and all the circumstances, are to be considered. Lord Ellenborough says, if the voyage is given up for any length of time, it will be a deviation, but there must, to have this effect, be a clear waste of time.<sup>5</sup> And Lord Kenyon says, "if there is any voluntary delay," the insurers are discharged.<sup>6</sup> "That delay," says Mr. Justice Story, "which is necessary to accomplish the

<sup>1</sup> *Hobart v. Norton*, 8 Pick. Mass. 159. See also, in confirmation of the same doctrine as to intention to deviate, 1 Johns. Cas. N. Y. 184; 2 Caines, Cas. N. Y. 172; 2 Caines, N. Y. 274; 11 Johns. N. Y. 261; 7 Mass. 349; 3 Cranch, 384. See also opinion of Lawrence, J., in *Middlewood v. Blakes*, 7 Term, 162, cited supra, c. 7, s. 6, No. 582.

<sup>2</sup> *Kewley v. Ryan*, 2 H. Blackst. 343;

*Stitt v. Wardell*, per Lord Kenyon, 2 Esp. 610; *Winthrop v. Union Ins. Co.* 2 Wash. C. C. 7.

<sup>3</sup> *Silva v. Low*, 1 Johns. Cas. N. Y. 184.

<sup>4</sup> *Syers v. Bridge*, Dougl. 529.

<sup>5</sup> *Grant v. King*, 4 Esp. 175.

<sup>6</sup> *Smith v. Surridge*, 4 Esp. 25; see same doctrine, per Kent, J., in *Suydam v. Marine Ins. Co.* 2 Johns. N. Y. 138, at p. 143.

objects of the voyage according to the course of the trade, if *bonâ fide*, cannot be admitted to avoid the insurance.”<sup>1</sup>

In all cases the departure from the usual course, or delay, must be limited to the purpose whereby it is justified.<sup>2</sup>

The delay is one of the elements of the deviation in going off the track of the voyage. Where the risk commences “at” the port of departure, an inexcusable delay to proceed after the risk has commenced,<sup>3</sup> instead of being a substitution of another entire risk, as above,<sup>4</sup> will be a deviation.

In case of a policy “at and from” Bristol to London, made January 28th, on a vessel which was then in complete preparation for the passage, but did not sail until May 17th, it was held to be a deviation.<sup>5</sup>

Converting the vessel into a “factory ship” or floating warehouse for receiving slaves on the coast of Africa, to be forwarded by other vessels, was held to be a deviation.<sup>6</sup>

So where a ship, insured in the African oil trade, with liberty to act as a tender, was detained as such in Benin River thirteen months, it was held to be a deviation.<sup>7</sup>

So it is a deviation, under a policy on a trip on a steamboat, in river navigation, to delay for the purpose of towing other vessels, unless this is authorized by usage or express liberty.<sup>8</sup>

A particular period being expressly allowed for delay at a place, limits the right of voluntary delay to that period; and where the policy allowed of a delay of two months at Monte Video, waiting there a longer time, for the blockade of Buenos Ayres to be raised, was held to be a deviation.<sup>9</sup>

A ship insured to a “port of discharge,” in an extensive district or country, may delay a reasonable time on her arriving in

<sup>1</sup> *Columbian Ins. Co. v. Catlett*, 12 Wheat. 283.      *Tennant v. Henderson*, 1 Dow, Parl. Cas. 324.

<sup>2</sup> *Oliver v. Maryland Ins. Co.* 7 Cranch, 487.      <sup>7</sup> *Hamilton v. Shedden*, 3 Mees. & W. Exch. 49; 1 Arnould, Ins. 389.

<sup>3</sup> See c. 11, s. 1, as to the commencement of the risk.      <sup>8</sup> *Hermann v. Western Fire & Mar. Ins. Co.* 15 La. 517; *Natchez Ins. Co. v. Stanton*, 10 Miss. 340.

<sup>4</sup> No. 991.      <sup>9</sup> *Doyle v. Powell*, 4 Barnew. & Ad. 267; and see *Marden v. South Carolina*

<sup>5</sup> *Palmer v. Marshall*, 8 Bingh. 79. See also *Palmer v. Fenning*, 9 id. 460; *Earl v. Shaw*, 1 Johns. Cas. N. Y. 313.      *Ins. Co.* 1 Const. So. C. 200; *supra*, No.

<sup>6</sup> *Hartley v. Buggin*, 3 Dougl. 39; 862.



the country, for instructions to what port of discharge to proceed; as in case of insurance to a port of discharge in the United States.<sup>1</sup>

A ship insured at and from Pillau to London was delayed for the purpose of making repairs. After being ready for sea, she was prevented from proceeding, for some time, by the lowness of water on the bar. Lord Kenyon instructed the jury, that it was "not necessary that the vessel should be seaworthy at the time" when the risk commenced, from which he inferred that a sufficient time might be taken for making repairs.<sup>2</sup>

A vessel insured in England, in August, having been purchased just before, then lying at Brest, in France, "at" and from that place to London, did not sail until the following March, the time being consumed in procuring an American crew in England, and other preparations for the voyage. Lord Ellenborough ruled, that, if the voyage had been given up for any length of time, the insurance would be defeated. Evidence being given that the voyage had not been given up, and that the delay had been occasioned by the difficulty in making the preparations, the jury found for the assured in a suit for a loss,<sup>3</sup> and this seems to have been the final disposition of the case.

A vessel insured from London to Virginia and back, was, on arriving in Virginia with a cargo of salt, in January, 1808, prevented by an embargo from loading with lumber to return until March, 1809, when the embargo was raised, though she might have returned with a cargo of salt in the mean time. The delay being for the purpose of prosecuting the voyage, and not as giving it up, it was held by Gibbs, C. J., and his associates, not to discharge the underwriters.<sup>4</sup>

A cargo of flour being insured "to St. Thomas and two other West India ports," it was held by the Supreme Court of the United States that a delay of twenty-two days at that port for the purpose of disposing of the cargo was not a deviation.<sup>5</sup>

<sup>1</sup> *King v. Middletown Ins. Co.* 1 Conn. 184.

<sup>2</sup> *Smith v. Surridge*, 4 Esp. 25.

<sup>3</sup> *Grant v. King*, 4 Esp. 175. The case of *Chitty v. Selwyn*, 2 Atk. Ch. 359, was cited for the defendants.

<sup>4</sup> *Schroder v. Thompson*, 7 Taunt. 462; 1 J. B. Moore, 163.

<sup>5</sup> *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383.

Delay for turn for admission into the Deptford Docks was held not to be a deviation, under a policy "to London":<sup>1</sup>

So also of delay, as customary, at an out-port until the sale of the cargo.<sup>2</sup>

The master's staying and detaining his vessel five months at Vera Cruz to claim his cargo, which had been seized by the government on being landed, was held not to be a deviation.<sup>3</sup>

In a case of insurance to the port of St. Jago, in Cuba, the vessel on arriving there was not admitted to entry, though not refused absolutely, and the master, for the purpose of obtaining permission to enter, delayed there twenty-three days. Mr. Justice Kent, in giving the opinion of the court, said, "The delay cannot be considered as amounting to a deviation, because it does not appear to be unreasonable or wilful," but resulted from a probable expectation of permission to enter.<sup>4</sup>

If the vessel enters a port to dispose of the cargo, the master may stay there a reasonable time for this purpose, although he meets with no success. A vessel put into Barracoa for this purpose, and remained there more than four months, during which time the supercargo made unsuccessful endeavors to effect a sale of the cargo. Yet the court said, "They could not intend any unreasonable delay or negligence on the part of the assured;" and held it not to be a deviation.<sup>5</sup>

Where a vessel under convoy touched at Madeira with the convoy, and delayed in discharging cargo there so long as to be separated from convoy for the rest of the voyage, it was ruled by Lord Ellenborough to be a deviation.<sup>6</sup>

<sup>1</sup> *Samuel v. Royal Exch. Ass. Co.* 8 Barnew. & C. 119; and see *Lapham v. Atlas Ins. Co.* 24 Pick. Mass. 1; *supra*, No. 963; and *Ellery v. New England Ins. Co.* 8 id. 14; *supra*, No. 964.

<sup>2</sup> *Grant v. Lexington Ins. Co.* 5 Ind. 23.

<sup>3</sup> *Stocker v. Harris*, 3 Mass. 409.

<sup>4</sup> *Suydam v. Marine Ins. Co.* 2 Johns. N. Y. 138.

<sup>5</sup> *Gilfert v. Hallet*, 2 Johns. Cas. N. Y. 296.

<sup>6</sup> *Williams v. Shee*, 3 Campb. 469.

SECTION VII. USAGE WILL JUSTIFY DEFLECTIONS AND DELAY OF  
THE VOYAGE.

1003. Usage, as we have seen, is the test of what belongs to the voyage, and the proper course in prosecuting it.<sup>1</sup>

*To constitute a usage, so as to justify touching on the mere force of the usage, the practice must have been sufficiently frequent to authorize a presumption of notice of it.*<sup>2</sup>

Two instances, though not in a very much frequented trade, are not enough.<sup>3</sup> This is supposing the exigencies of the voyage not to require that the vessel should touch.

It is not a deviation to stop at places where it is the usage to stop on the same voyage, passage, or trip, for the purpose of landing or taking in passengers or goods, or gaining intelligence, or procuring provisions and supplies, or for any other purpose to which the usage extends. This doctrine is particularly applicable to river and coasting passages, long foreign voyages, and those for trading or fishing, whether the contract referred to is a policy of insurance,<sup>4</sup> or a bill of lading.<sup>5</sup>

Under the general description of an East India voyage, intermediate voyages were, formerly at least, included, in pursuance of the practice of the East India Company to employ vessels in their service upon such voyages.

Under a policy upon goods until they should be discharged on the coast of Labrador, Lord Mansfield and his associates held, that delay for two months in fishing, before discharging the goods, was justified by usage.<sup>6</sup>

In a case before Lord Eldon, on a vessel insured from Newfoundland to Portugal, where the vessel went to Sidney in Nova Scotia, for a cargo of coals, he ruled that such subordinate voyage, being in conformity to usage, was not a deviation.<sup>7</sup>

<sup>1</sup> Supra, s. 1. See also supra, c. 1, s. 13.

<sup>2</sup> Bentaloe v. Pratt, Wall. C. C. 64.

<sup>3</sup> Martin v. Delaware Ins. Co. 2 Wash. C. C. 254.

<sup>4</sup> Child v. Sun Mutual Ins. Co. 3 Sandf. N. Y. 26; Lockett v. Merchants' Ins. Co. 10 Rob. La. 339.

<sup>5</sup> Lowry v. Russell, 8 Pick. Mass. 360.

<sup>6</sup> Noble v. Kenoway, Dougl. 492.

<sup>7</sup> Ougier v. Jennings, 1 Campb. 505, n. But see Seccomb v. Provincial Ins. Co. 10 All. Mass. 305.

So delay for the purpose of fishing, under a policy at and from Newfoundland, was ruled by Lord Ellenborough to be justified on the ground of usage.<sup>1</sup>

SECTION VIII. LIBERTY TO TURN FROM THE DIRECT OR USUAL COURSE, OR TO DELAY, OR TO VARY FROM THE USUAL RISKS.

1004. *It is a deviation to touch at a port, though it is near the course of the voyage, unless so doing is justified by usage, or necessity, or express liberty:*

As touching at the island of Mauritius in a voyage from India.<sup>2</sup>

It is a deviation to go off the course of the voyage for papers, though leave is given in the policy to take any kind of papers.<sup>3</sup>

It is not a deviation to leave the course for the necessary purposes of the voyage, such as obtaining a pilot.<sup>4</sup>

The master is justified in departing from the usual course, not only for the purposes of the most speedy and advantageous prosecution of the voyage, but also for safety of life and property.<sup>5</sup>

Insurance for six months "between New Orleans and any port in the United States or Gulf of Mexico," was held in Louisiana not to cover a passage between the West Indies and another port in the United States than New Orleans.<sup>6</sup>

Goods were insured "from St. Martha on the Main to New York," and privilege given to "use three additional ports on the voyage from the Spanish Main to New York." It was held no deviation to visit three other ports on the Main besides St. Martha.<sup>7</sup>

1005. *The construction of a mere liberty to touch must be governed by the character of the voyage and the other provisions of the policy or the representations of the purpose by the assured, and*

<sup>1</sup> Vallance v. Dewar, 1 Campb. 503.

<sup>5</sup> Turner v. Protection Ins. Co. 25

<sup>2</sup> Winthrop v. Union Ins. Co. 2 Me. 515.

Wash. C. C. 7.

<sup>6</sup> Lippincourt v. Louisiana Ins. Co.

<sup>3</sup> Stocker v. Harris, 3 Mass. 409.

2 La. 399.

<sup>4</sup> Puverin v. La. State Fire & Mar. Ins. Co. 4 Rob. La. 234.

<sup>7</sup> De Peyster v. Sun Ins. Co. 19 N. Y. 272.



if the purpose is expressed, the construction is to be liberal in reference to such purpose.

Sir J. Mansfield says, "It is doubtful, nor can he find it anywhere defined, what is the precise meaning of *liberty to touch*, as contradistinguished from *liberty to touch and stay*. The time of staying in both instances is perfectly undefined; and no case decides how long, or for what purposes, a ship may stay under these clauses."<sup>1</sup> The case before him was that of a policy on a voyage from Madeira to Santos, with "liberty to touch at the Cape de Verde Islands," and the additional "liberty to touch and stay at any ports or places whatsoever." The ship touched at Bonavista.

Leave, in a voyage from Antigua to England, to touch at all or any of the West India Islands, "including Jamaica," allows of going out of the course of that voyage to St. Kitts, as Jamaica, to which the liberty expressly extended, is far out of that course.<sup>2</sup>

Leave to stop at Matanzas, to inquire if there were any men of war off Havana, was construed by the Supreme Court of the United States to permit remaining there "so long as the danger continued."<sup>3</sup>

Under a policy on goods with a conditional liberty "to enter a Dutch port, when informed on arriving, &c., that it might be done with safety," the captain, being informed that he might proceed to Amsterdam "without molestation from the British," attempted to put in there, and was captured by the French. This attempt was held in Pennsylvania to be a deviation, because the captain did not bring himself within the condition.<sup>4</sup>

Under liberty to join convoy, the vessel may, if necessary, go out of the usual course to join it; but the leave in this form being

<sup>1</sup> *Urquhart v. Barnard*, 1 Taunt. 450.

<sup>2</sup> *Metcalf v. Parry*, 4 Campb. 123, per Gibbs, C. J.; *Urquhart v. Barnard*, 1 Taunt. 450. In this case Sir J. Mansfield refers to an obiter remark, erroneously, as he intimates, attributed to Lord Mansfield, in *Gregory v. Christie, Park, Ins.* 84, 3 Dougl. 419, that "liberty to touch and stay, can only be intended to give permission if necessity

obliges them." It would require a very strong authority for imputing such a proposition to Lord Mansfield, and a still greater than his own to give it any weight, since it would, as Sir J. Mansfield remarks, annul the clause, as necessity of itself authorizes touching.

<sup>3</sup> *Hughes v. Union Ins. Co.* 3 Wheat. 159.

<sup>4</sup> *Duerhagan v. United States Ins. Co.* 2 Serg. & R. Penn. 309.

given for his benefit, he may, if there is no law to the contrary, proceed without convoy.<sup>1</sup>

1006. *Leave to touch at a port named does not authorize the substitution of another, though not more out of the course.*<sup>2</sup>

1007. *A general liberty to touch at a port or at ports, without specifying them, will justify touching only for the purposes of the voyage.*<sup>3</sup>

Abbott, C. J., and his associates of the King's Bench in England, decided that, under leave to call, in a policy upon the ship, the calling to learn the state of the markets, in reference to another voyage, was a deviation.<sup>4</sup>

A vessel insured from Hull to her port or ports of lading in the Baltic, "with liberty in said voyage to proceed and sail to, and touch and stay at, any ports whatsoever and wheresoever, for all purposes, particularly at Elsinore," took goods to be delivered at Elsinore, Dantzic, and Pillau; the last being the intended port of lading. She was lost in sight of Pillau, after having delivered goods at Elsinore and Dantzic. Abbott, C. J.: "The liberty to touch at any ports for all purposes, must mean for purposes connected with the voyage. If the ship had gone to Elsinore or Dantzic, to see if she could get a cargo, that would have been connected with the voyage; but she went for the purpose of delivering goods, which was wholly unconnected with the object of the voyage insured."<sup>5</sup>

The doctrine of this case is no doubt correct, but its application is questionable. It is not said that the ship was to go out empty, and that the homeward freight was the sole object. The broad leave to touch implies the contrary; and, as the underwriters were bound to take notice of some purpose for touching,

<sup>1</sup> *Heselton v. Allnut*, 1 Maule & S. 46.

<sup>2</sup> *Elliot v. Wilson*, 4 Brown, Parl. Cas. 470.

<sup>3</sup> 3 Kent, Comm., 3d ed. 315; and see cases passim. Chancellor Kent remarks, that liberty to go out of the course is construed strictly; but I am not aware of the practical application of such a rule in jurisprudence. The words, being those of the underwriter,

should, if there is any question, according to the general doctrine in such case, be construed liberally in favor of the assured.

<sup>4</sup> *Hammond v. Reid*, 4 Barnew. & Ald. 72; and see *Langhorn v. Allnut*, 4 Taunt. 511; *Rucker v. Allnut*, 15 East, 278; and cases generally.

<sup>5</sup> *Solly v. Whitmore*, 5 Barnew. & Ald. 45.

there is apparently no reason for excluding the delivery of goods from being one. It was apparently the most probable one on such a voyage.<sup>1</sup>

Goods were insured from London to a port of discharge in the Straits as high as Messina, with power, in the voyage, to stop or stay at any ports or places whatsoever. The vessel sailed from London with lead from Marseilles, and put into Falmouth, and staid there three weeks, taking in tin for the same port of destination. The putting into Falmouth was held to be a deviation.<sup>2</sup>

1008. *Liberty to touch at ports*, without specifying them, *will justify going off the direct or usual course*, to the right or left, *but not going far from the course*, or in an opposite direction, especially not to a place more distant than the specified port of departure is from the specified port of destination :

As going southward to Faro for cargo, under a policy on a ship from Lisbon to England.<sup>3</sup>

Insurance being "from L'Orient to Pondicherry, Madras, and China, and back to the ship's port of discharge in France, with liberty to touch at I. and B., and all and any other places what and wheresoever, and in the outward and homeward bound voyage to proceed and to touch and stay at any port and places whatsoever," Lord Mansfield, with his associates, Willes, Ashurst, and Buller, were of opinion that the liberty was limited, by the words "in the outward and homeward voyage," to places lying in the usual course of the voyage, between the specified termini.<sup>4</sup>

The broadest liberty, including that of sailing "forwards and backwards, and backwards and forwards, in a voyage" to New South Wales, and thence "to all ports and places in the East Indies and South America," does not cover an independent voyage from New South Wales to New Zealand, not justified by usage, and wholly unconnected with one to any of the specified ports of destination.<sup>5</sup>

<sup>1</sup> See *Metcalf v. Parry*, 4 Campb. 123.

<sup>2</sup> *Clason v. Sinmonds*, 6 Term, 533, n.

<sup>3</sup> *Hogg v. Horner*, Park, Ins. 444; and see *Rankin v. Reave*, 2 Park, Ins. 7th ed. 415.

<sup>4</sup> *Lavabre v. Wilson*, and the Same *v. Walter*, Dougl. 271.

<sup>5</sup> *Bottomly v. Bovill*, 5 Barnew. & C. 210; *Dowl. & R.* 702.

1009. *Leave to sail "backwards and forwards," or to touch "one or more times," authorizes intermediate passages, this being the obvious construction.*

The insurance being "from L'Orient to the Isles of France and Bourbon, and to all ports and places in the East Indies, China, Persia, or elsewhere during the ship's stay, and trade backwards and forwards, until her safe arrival back to her port of discharge in France," the assured represented that the voyage was intended to be to the Isle of France, Pondicherry, and China. Lord Mansfield instructed the jury that, under this description, the representation did not preclude the assured from changing his mind and going from Pondicherry to Bengal, and that the representation was controlled by the description in the policy. He said the representation would have no effect, excepting upon the ground of fraud. That is, if it was made for the purpose of deceiving the underwriters, the assured having no intention to take the course represented, it would defeat the policy.<sup>1</sup>

A ship and cargo were insured "from Boston to any port or ports beyond the Cape of Good Hope, one or more times to the same port, for the purpose of selling the outward and procuring a return cargo, and at and from thence to port of final discharge in the United States." The ship proceeded to Cochin China; and the master, finding that he could not purchase a cargo with the gold he had taken thither for the purpose, made a voyage to Manilla to exchange it for silver, and returned to Cochin China and bought about one eighth of a cargo of sugar, and then proceeded to Batavia, but, not being able to complete his cargo of sugar there on satisfactory terms, sold what he had brought thither, in order to go to Samarang to procure a cargo, not being permitted to take any cargo thither from Batavia. The vessel was loaded at Samarang, and was lost on her voyage to Europe. The voyage from Cochin China to Manilla and back was held not to be a deviation.<sup>2</sup>

<sup>1</sup> *Bize v. Fletcher*, Dougl. 271.

<sup>2</sup> *Thorndike v. Bordman*, 4 Pick. Mass. 471. See also an important case stated *infra* in this section, *Ashley v. Pratt*, 16 Mees. & W. Exch. 471; S. C.

in error, 1 Exch. 257, in which insurance from Liverpool to ports in China and Manilla, and thence to the United Kingdom, is held to authorize going from the port of discharge of the out-



1010. *Where the voyage insured is from a certain port to sundry others in a certain district, or to ports particularly specified in their geographical order, and to a final port of discharge, or one of ulterior destination, with leave to touch at certain intermediate ports, named in the policy in their geographical order, a part of the risk may be omitted by passing any of the ports, but as many as are visited must be so in their geographical order, or in an order having reference to progress to the ulterior destination, unless a different order is justified by the nature of the voyage, or some provision of the policy, or usage.*

Thus, where an insurance was on goods from Liverpool to Palermo, Messina, and Naples, and the vessel cleared and sailed for Naples, and was captured in the Bay of Biscay, Lord Ellenborough and his associates held that this was not sailing on a different voyage, and that a voyage to those three places meant a voyage to either of them, or any of them in their order.<sup>1</sup>

Another illustration of the same doctrine is the insurance on a vessel and cargo from New York to Antigua and Curaçoa, in respect of which it was decided in New York that sailing directly to the latter place was the same voyage, and not a deviation.<sup>2</sup>

Goods being insured on a voyage from London to "a port or ports of discharge in the Straits, with power in the voyage to stop and stay at any ports or places," the vessel took goods for Marseilles. When she was off that port, the wind being adverse, she could not get in there, but was driven towards Corsica, and thereupon went to Genoa and Leghorn, and returned thence for Marseilles, and was captured on the way thither. This was held to be a deviation,<sup>3</sup> because the ports were not taken in the proper order; or, rather, it was held that the risk ended in such case at Leghorn, the most distant port of destination.

In this case the question is not distinctly made, whether, in the situation in which the ship was, when driven towards Corsica, it was the most expedient course, considering the circumstances and the objects of the voyage, to proceed to Genoa and Leghorn

ward cargo in Manilla to Tongkoo in China, more distant from the United Kingdom, for a homeward cargo.

<sup>1</sup> Marsden v. Reid, 3 East, 572.

<sup>2</sup> Kane v. Columbian Ins. Co. 2 Johns. N. Y. 264. See also Cross v. Shutcliffe, 2 Bay, So. C. 220.

<sup>3</sup> Clason v. Simmonds, 6 Term, 533, n.

before putting into Marseilles. The case was decided by the jury very much upon the general opinion of witnesses, and stress was also put by the court upon a representation of the assured, as to the intended route and ports of destination; so that it seems to have very little weight as an authority.

So, insurance from Boston to Terceira, with a provision for an additional premium for every other port used in the Western Islands, being considered to be equivalent to a policy to that and other ports, a like decision was made in Massachusetts, in case of the vessel's omitting Terceira and proceeding to Graciosa.<sup>1</sup>

A Virginia chancery case of 1810 puts a different construction upon a similar provision. A ship and cargo were insured from Norfolk to Curaçoa, with liberty to go to any other island of the West Indies, or any one port on the Spanish Main, and "at and from thence to Norfolk." The captain put into St. Thomas, through fear, as he alleged, of being captured by privateers, and being there, sold his cargo and took a cargo thence to Norfolk. The case was an application to the court for an injunction on the underwriters not to proceed at law on the premium note. The right to proceed at law was put upon the ground that there had been a deviation. The court were of opinion that, if the captain had put into St. Thomas voluntarily, it was a deviation.<sup>2</sup> This construction is at variance with the preceding cases. It was only omitting a part of the risk, and being there, he might omit any other intermediate port which he was authorized by the policy to visit, and proceed directly to a subsequent one, or to Norfolk, the ultimate one.<sup>3</sup>

An insurance being to a certain port "and a market," such port may be omitted. Under a policy "to Kingston and a market in Jamaica," it was held in Massachusetts not to be a deviation to omit Kingston and go to Port Maria in that island.<sup>4</sup>

1011. *The rule as to taking ports in their order is applicable only in reference to some ulterior port of destination already fixed upon, and not to touching for instructions to determine on such ulterior port.*

<sup>1</sup> Hale v. Mercantile Ins. Co. 6 Pick. Mass. 113.

<sup>2</sup> Marine Ins. Co. v. Straas, 1 Munf. Va. 408.

<sup>3</sup> Harrington v. Halkeld, Park, Ins. 8th ed. 639.

<sup>4</sup> Houston v. New England Ins. Co. 5 Pick. Mass. 89.

Accordingly, under a policy on goods "from London to the ship's discharging port or ports in the Baltic, with liberty to touch at any port or ports for orders or any other purpose," it was held by Gibbs, C. J., and his associates of the English Court of Exchequer Chamber not to be a deviation to touch at Carlsham for orders as to the port of discharge, and sail thence, by direction of the assured's agent, back to Swinnemunde, which is a less distance from London, to ascertain of another agent the port of discharge, and then, by instruction from such other agent, to proceed again to Carlsham for a like purpose.<sup>1</sup>

1012. *Whether the order of the ports as stated in the policy must be followed, where it is not the geographical order?*

It was held by Lord Kenyon and his associates, that a vessel insured to divers ports must touch in their order in the policy, where it differs from the geographical order, unless a usage to the contrary is proved. It was an insurance "from Gothenburg to Leith and Mackenzie," the two latter being about a mile asunder, and the vessel touched first at Mackenzie, which is further from Gothenburg, and sustained damage on leaving that port for Leith.<sup>2</sup>

In such a case the more obvious construction, considering the relative position of the ports to each other and to the port of departure, seems to be, that the order is indifferent, and that the description is intended merely to specify the limits of the voyage, without regard to the order of putting into the ports of destination.<sup>3</sup>

There are regions where the seasons and prevailing winds and currents conclusively determine the order in which ports are to be visited, and to adopt the construction that the order in the policy or the geographical order is to be observed, would be simply absurd.<sup>4</sup>

1013. *Where the subsequent and ultimate ports of destination are specified, and the intermediate ones comprehended in some general description, any of these may be visited, but they must be visited in an order having reference to progress towards the*

<sup>1</sup> Andrews v. Mellish, 5 Taunt. Exch. 471; and S. C. in error, Pratt v. Ashley, 1 Exch. 257.

<sup>2</sup> Beatson v. Haworth, 6 Term, 531.

<sup>4</sup> See Gairdner v. Senhouse, 3 Taunt.

<sup>3</sup> See Ashley v. Pratt, 16 Mees. & W. 16, and infra, No. 1013.

*specified ulterior ports*, unless the policy provides otherwise by allowing of voyages backwards and forwards.

The order having such reference is not necessarily governed by the geographical distance from the port of departure, or that of each successive port from the preceding, but will be affected by usage, as already mentioned,<sup>1</sup> and also by the prevailing winds and currents of the region in different seasons, especially in the West Indies and other tropical regions, and also by the circumstances and incidents of the particular passage.

Goods being insured "at and from Martinique and all and any of the West India Islands to London, from the time of loading thereof," with leave "to touch and stay at any ports whatever," the vessel sailed from Martinique to St. Domingo, which was much out of the course to London. It was objected that this was a deviation. Sir James Mansfield said, there was no getting over the words of the policy, and that to make out a deviation, instead of "all," you must say "some" of the West India Islands.<sup>2</sup>

The nature and objects of the voyage, as specified in the policy, may justify intermediate voyages, and sailing forwards and backwards.<sup>3</sup>

1014. *Insurance generally "to a market," or for the purpose of obtaining or loading a cargo, or trading, in a certain region, authorizes passages backwards and forwards for the purposes of the voyage, regard being had to the prevailing winds and currents as to the order of touching at ports, and such a policy covers the risk to the same port more than once:*

As in a policy upon a vessel to St. Thomas and a market in the West Indies.<sup>4</sup> The ports are not to be taken in such order, in respect of currents and winds and seasons, as to prolong the risk superfluously and indefinitely.

Goods on board of the Good Hope were insured on a voyage "from London to Trinidad, or any ports of discharge in the Spanish Main, all or either, with leave to call at any of the West India Islands, Jamaica and St. Domingo excepted, and to touch

<sup>1</sup> *Supra*, No. 1012.

<sup>4</sup> *Deblois v. Ocean Ins. Co.* 16 Pick.

<sup>2</sup> *Bragg v. Anderson*, 4 Taunt. 229. Mass. 303.

<sup>3</sup> See *Ashley v. Pratt*, 16 Mees. & W. Exch. 471; 1 Exch. 257.



and stay at any ports whatsoever, for convoy or trade." The vessel proceeded to Demerara, and thence, after two days, ran down in sight, successively, of Tobago, St. Vincent's, and St. Lucia, and touched at Martinique; after staying four days there she shaped her course for St. Thomas, passing by St. Kitts, and in the night struck on the Anegada Reef, where she was lost. The underwriters objected to a claim for loss, that the sailing for St. Thomas was not the proper course in reference to the ulterior ports. Mansfield, C. J., and the other judges of the English Common Pleas, held that the case must turn upon the verdict which the jury might give as to this fact.<sup>1</sup> It seems that Martinique was the intended destination, and if so, reference was to be had to that destination in deciding the question of deviation.

It was held by Abbott, C. J., and his associates, that, under an insurance on freight at and from the island of Grenada, in the West Indies, to London, with the broadest liberty to "touch and stay, and load and unload," the risk attached and continued while the vessel was at the island, visiting place after place, discharging her outward cargo, in preparation, as the court said, for taking on board her homeward cargo; and that the underwriters were answerable for a loss of the homeward freight, by the loss of the vessel before any part of the homeward cargo had been taken on board. The decision was put partly upon the particular trade and its usages.<sup>2</sup> It seems, however, to admit of doubt, whether the interest in this insurable subject for the homeward voyage had accrued at the time of the loss.<sup>3</sup>

A policy being on a ship from London to New South Wales, and thence to ports in India, China, and Persia, and to her port of discharge in Great Britain, with the broadest liberty to touch and stay, and trade, "at all places, and for any purpose," and sail forwards and backwards, the ship took a cargo of iron at Batavia, and delivered it at Sourabaya, and there took a cargo of rice to be delivered at the Mauritius, it being intended to take a cargo of cotton thence on freight. The ship having been damaged, the claim for the loss was objected to on the ground of de-

<sup>1</sup> *Gairdner v. Senhouse*, 3 Taunt. 538; 7 Dowl. & R. 1; 1 Carr. & P. 16.

237.

<sup>2</sup> *Warre v. Miller*, 4 Barnw. & C. <sup>3</sup> See *supra*, c. 3, s. 11.

viation; but Dallas, C. J., and the other judges of the English Common Pleas, decided in favor of the claim.<sup>1</sup>

1015. *In case of insurance outward to any and any number of numerous ports within extensive limits, and thence homeward, with broad liberty to touch and stay, the vessel may, from the character of the voyage described, have the liberty of an intermediate passage, after discharging her outward cargo, to a more distant port for a return cargo.*

This proposition is illustrated by an ably contested case of weighty authority, decided in the English Court of Exchequer, and on error in that of the Exchequer Chamber, though, on the first impression, it seems to require a very nice and difficult discrimination to distinguish it from some of the cases above referred to, in which an opposite decision was given.

It is on a policy "at and from Liverpool to ports and places in China and Manilla, all or any, during the ship's stay there for any purposes, and thence to her port or ports of calling and discharge in the United Kingdom, with liberty to call and stay at all or any ports or places." The master, after discharging the outward cargo at Tongkoo, in China, and the remainder at a port in Manilla, not finding a homeward freight at the latter, took on board 230 chests of tea, being about one tenth of a cargo, to be delivered at Tongkoo, and was proceeding back thither, in an opposite direction to the course to the United Kingdom, for a homeward freight, when the vessel was wrecked and lost. The taking of the tea was considered by the court to be incidental merely, and the case was treated as if she had gone without any cargo.

The Court of Exchequer, Pollock, C. B., giving their opinion, decided that, under this policy, the vessel, after delivering her outward cargo, might proceed to any of the ports within the specified limits for a homeward cargo.<sup>2</sup>

In the Exchequer Chamber, in error, Denman, C. J., giving the opinion of the court, said: "The words 'China' and 'Manilla' are not to be construed as showing the order in which the ship was to proceed, but must be taken as the ditrsiet comprehending

<sup>1</sup> *Armet v. Innes*, 4 J. B. Moore, 150.      <sup>2</sup> *Ashley v. Pratt*, 16 Mees. & W. Exch. 471.

all the ports and places from which the vessel might take her homeward cargo.”<sup>1</sup>

Considering the character of the voyage, as described in the policy, there seems in this case to be a fair ground for the insurers to presume that the vessel might have to revisit a port, or proceed to one more distant, for her homeward cargo.

In a voyage to South America and back, with liberty to go to Europe, the assured was not justified in making an intermediate voyage between European ports.<sup>2</sup>

1016. *Whether liberty to touch implies that of delay for the purpose of trading and discharging and taking in cargo, or any other purpose not specified, will depend upon the character and objects of the voyage, as described in the policy, and also upon usage.*

Liberty to touch implies that of discharging and taking in goods, unless a different object is expressed or implied.<sup>3</sup>

1017. In regard to what constitutes a sufficient necessity, different persons would no doubt entertain different opinions upon the same facts. But it would be a very strict and illiberal construction to hold a delay or departure from the course, when it is expedient and necessary in the master's opinion, to be a deviation, because others, and more justly too, perhaps, should think it was unnecessary and inexpedient. *Great weight is therefore allowed to the fair and honest exercise of discretion on the part of the master, in cases of this sort, as will appear from the whole course of jurisprudence on the subject.*<sup>4</sup>

#### SECTION IX. TURNING OFF AND DELAY FOR REPAIRS AND TO REFIT.

1018. *In extraordinary emergencies, the captain may go out of the usual or stipulated course, or delay or vary from the usage :*

As to procure men, the crew having become, by sickness and death, too weak to proceed on the voyage with safety :<sup>5</sup> but he

<sup>1</sup> Pratt v. Ashley, 1 Exch. 257.

<sup>5</sup> Cruder v. Philadelphia Ins. Co. 2

<sup>2</sup> Seecomb v. Provincial Ins. Co. 10 All. Mass. 305.

Wash. C. C. 262; same Plff. v. Penn. Ins. Co. id. 339; Winthrop v. Union

<sup>3</sup> Metcalfe v. Parry, 4 Campb. 123.

Ins. Co. 2 Wash. C. C. 7; Woolf v.

<sup>4</sup> Stocker v. Harris, 3 Mass. 409.

Claggett, 3 Esp. 257.

cannot do so to supply a deficiency in the crew existing at the commencement of the voyage.<sup>1</sup>

1019. The most frequent emergency for going off the usual course of the voyage is to seek a port of necessity, to repair damages and to refit. *When, in consequence of disaster, the vessel cannot safely pursue the voyage, the master is not only justified in quitting the course and seeking the most convenient and suitable port for repairs and supplies, or on account of other exigencies of the voyage, but it is his duty to seek such port.*<sup>2</sup>

1020. *If a vessel does not find repairs and supplies at the first port of necessity, it may proceed to a second.*<sup>3</sup>

1021. *Such superinduced digression must be prosecuted with diligence and dispatch, and the main voyage must be resumed as soon as may be, and unnecessary and voluntary delay in this respect is a deviation.*

1022. *In reference to such deflections, the measures taken by the master in good faith and an honest exercise of discretion used within its proper limits, though not the most judicious, are vindicated in jurisprudence, as already stated in reference to other emergencies :*

As in case of the master's attempting to put into the port of Boston, as a port of necessity, on a voyage from Matanzas to St. Petersburg, instead of steering for some port nearer to his course.<sup>4</sup>

SECTION X. TURNING OFF TO AVOID PERILS INSURED AGAINST,  
OR NOT INSURED AGAINST.

1023. *The ship may go out of its course, or delay to avoid disaster, no less than to refit after one has happened.*

As to avoid capture:<sup>5</sup>

<sup>1</sup> Folsom v. Merchants' Ins. Co. 38 Me. 414; Silva v. Low, 1 Johns. Cas. N. Y. 184.

<sup>2</sup> Motteux v. London Ass. Co. 1 Atk. Ch. 545; Pelly v. Royal Exch. Ass. Co. 1 Burr. 341.

<sup>3</sup> Hall v. Franklin Ins. Co. 9 Pick. Mass. 466

<sup>4</sup> Turner v. Protection Ins. Co. 25 Me. 515.

<sup>5</sup> Goyon v. Pleasants, 3 Wash. C. C. 241; Oliver v. Maryland Ins. Co. 7 Cranch, 487; Whitney v. Haven, 13 Mass. 172; Reade v. Commercial Ins. Co. 3 Johns. N. Y. 352; Blackenhagen v. London Ass. Co. 1 Campb. 454; Miller v. Russell, 1 Bay, So. C. 309.



Or to join convoy, though not warranted or represented to sail with convoy :<sup>1</sup>

Or to avoid ice :<sup>2</sup>

Or to gain intelligence at an intermediate port, in case of the master having been informed on the voyage that trade at his port of destination had been put under the same restrictions as if it were blockaded :<sup>3</sup>

Or leaving a port with the vessel in an unseaworthy condition, to avoid being surprised and seized there.<sup>4</sup>

In case of danger of the ship stranding on a bar in going out of the port of necessity, it is not an unjustifiable change of the risk to send the cargo round to a neighboring port to be taken on board there. It was so held where the vessel put back to Bourdeaux, the port of departure, as a port of necessity.<sup>5</sup>

It was held not to be a deviation by a Danish ship, during hostilities between Denmark and Great Britain, to be put by the master under the protection of an American frigate, as a pretended prize, for the purpose of avoiding capture by British cruisers, the risks insured against not being thereby changed or enhanced, but rather diminished.<sup>6</sup>

A diversion from the prosecution of the voyage by request or order of the commander of a public vessel, not accompanied by any threat, and without any fear of danger in case of non-compliance, is a deviation.<sup>7</sup>

1024. *Where the vessel is forced from the course by a peril insured against, it is undoubtedly not a deviation :*

As where the insurance is against barratry, among other risks, and the vessel is barratrously taken from its course.<sup>8</sup>

*So it is not a deviation where the vessel is voluntarily put off the course in consequence of damage by a peril insured against, as is illustrated fully by the cases above referred to in this section, and that next preceding.*

<sup>1</sup> Patrick v. Ludlow, 3 Johns. Cas. N. Y. 10.

<sup>2</sup> Graham v. Commercial Ins. Co. 11 Johns. N. Y. 352.

<sup>3</sup> Lee v. Gray, 7 Mass. 349.

<sup>4</sup> O'Reilly v. Gonne, 4 Campb. 249.

<sup>5</sup> Wiggin v. Amory, 13 Mass. 118.

<sup>6</sup> Gouverneur v. United Ins. Co. 1

Caines, N. Y. 592 ; though the captain of the frigate transcended the limits of his duty in so lending his protection.

<sup>7</sup> Ruled by Lord Ellenborough, Phelps v. Auldjo, 2 Campb. 350.

<sup>8</sup> Vallejo v. Wheeler, Cowp. 143 ; M'Intire v. Bowne, 1 Johns. N. Y.

229.

1025. *Going off the course, or delay, from necessity or any cause which would be justifiable under a policy against the perils of the sea generally, is not a deviation under a policy against one or some only of such perils.*

It cannot but be known to the parties to such a policy, that the vessel is to be subject to the other perils usually included in policies, and that the particular risks insured against are subject to be affected by the others which are not covered, and the fair inference is, that they do not contemplate the forfeiture of the insurance by the risks insured against being thus affected. The doctrine above stated is accordingly, notwithstanding some contrary decisions, conclusively established:

As in case of a vessel insured only against sea-risks and fire being detained by arrest, and then sustaining sea-damage:<sup>1</sup>

And of a vessel insured against capture only being blown to the coast of France, and there captured:<sup>2</sup>

And of a like policy, and the vessel being exposed to capture by her slow sailing:<sup>3</sup>

And of a vessel insured except against seizure for illicit trade going off the course to avoid such seizure:<sup>4</sup>

And of a vessel insured against sea-risk only going off its course to avoid a violation of blockade.<sup>5</sup>

The doctrine thus settled is not shaken in the least by the few decisions of a different aspect.<sup>6</sup>

In a ruling by C. J. Gibbs, just referred to, he makes a distinction between a digression on account of a peril not insured against,<sup>7</sup> and one on account of a peril insured against,<sup>8</sup> from which Mr. Arnould deduces the rule, that a digression to avoid an excepted peril is a deviation, though the being irresistibly compelled out of the course by the operation of such a peril is

<sup>1</sup> Scott v. Thompson, 4 Bos. & P. 581; Gray, 7 Mass. 349; Richardson v. Maine F. & Mar. Ins. Co. 6 id. 102.

<sup>2</sup> Green v. Elmslie, Peake, 212.

<sup>3</sup> Per Lord Ellenborough, 12 East, 653.

<sup>4</sup> Riggen v. Patapsco Ins. Co. 7 Harr. & J. Md. 279.

<sup>5</sup> Robinson v. Marine Ins. Co. of New York, 2 Johns. N. Y. 89; Lee v.

<sup>6</sup> O'Reilly v. Royal Exch. Ass. Co. 4 Campb. 246, per Gibbs, C. J.; Breed v. Eaton, 10 Mass. 22, and see Rand's note, ibid.; Roget v. Thurston, 2 Johns. Cas. N. Y. 248.

<sup>7</sup> O'Reilly v. Royal Exch. Ass. Co. 4 Campb. 246.

<sup>8</sup> O'Reilly v. Gonne, 4 Campb. 247.

not so.<sup>1</sup> But as I understand the report, the Chief Justice rests his different rulings in the two cases referred to wholly upon the distinction that the risk is excepted in one case and not so in the other, and not at all upon the distinction between going off the course to avoid, and being irresistibly driven off by, an excepted peril. This seems, it is true, to be the only way of vindicating the ruling against the claim for loss in one of the cases, since, without this distinction, it is palpably inconsistent with a conclusively established doctrine. I cannot, however, deem this vindication tenable, since, if the underwriters are liable to be affected by the operation of the excepted peril, as where, under insurance against sea-risks only, those are liable to be prolonged and aggravated by detention and capture, the underwriters are as directly interested in avoiding these perils as if the policy had included them, though not in the same degree. Accordingly, some of the deliberate adjudications above stated are directly opposed to such a distinction, and their authority does not seem to be shaken by a hasty ruling at *Nisi Prius*.

But if the voyage is given up, and another entirely distinct one undertaken, on account of a peril not insured against, the risk thereupon ceases.<sup>2</sup>

1026. *If the vessel meets with an obstacle independent of the perils ordinarily insured against, and the master, not from necessity or for the safety of the lives and property on board, undertakes a new, wholly distinct, independent adventure, it is a deviation, though his intention may be thereby to accelerate the voyage.*

Where, under a policy upon the ship and freight from Boston to Gibraltar, and thence to St. Ubes or the Cape de Verde Islands, for salt, and thence back to Boston, the master, on arriving at one of the Cape de Verde Islands, found so many waiting there for cargoes that his turn to load would not come within four or five weeks, and he accepted a proposal of the Governor to go to St. Jago and Fuego for a cargo of provisions, on a promise of being loaded with salt for home so soon as he should return, his going on this intermediate voyage was held in Massachusetts to be a deviation.<sup>3</sup>

<sup>1</sup> 1 Arnould, Mar. Ins. 407.

ardson v. Maine F. & Mar. Ins. Co. 6

<sup>2</sup> Lee v. Gray, 7 Mass. 349; Rich-

id. 102.

<sup>3</sup> Kettell v. Wiggin, 13 Mass. 68.

The case was one for the jury rather than for the court, and the opinion is accordingly not of predominating weight. One reason assigned for accepting the proposal was, the vessel's being short of provisions for the delay until her turn came. The court remarked that she ought to have taken a sufficient supply at Gibraltar for such a delay. The ground of the opinion was, that the occasion did not authorize the master to speculate in this manner upon the possible advantage of hastening his departure by thus going out of the regular course of the voyage.

A case somewhat similar occurred in New York, in which a like decision was made. A vessel was insured for a voyage from New York to Teneriffe, "with permission to proceed from Teneriffe to the Isle of May and Bonavista, and at and from them, or either of them, to New York." The vessel, on arriving at Teneriffe, was required to perform a quarantine of forty days, because her bill of health had not been certified by the Spanish consul at New York. With a bill of health so certified, she would have been subjected to a quarantine of only eight days. The second day after arrival at Teneriffe, permission was given to land the corn, which constituted a part of the cargo, which was prevented for thirteen days after by the state of the weather, and then the landing of the cargo there was prohibited absolutely on account of not having the required bill of health; whereupon the master proceeded to Madeira and discharged his cargo there. It was held that this passage was made from a necessity for which the assured was wholly answerable, whereby the insurers were not liable to be affected, and accordingly, that it was a deviation.<sup>1</sup>

SECTION XI. DELAY FOR THE PURPOSE OF SUCCORING THE DISTRESSED, OR TO SAVE THE PROPERTY OF OTHERS.

1027. *Delay or going out of the course to succor those who are in distress, has been invariably held not to be a deviation.*

This justification of a departure from the usual course of the risk, though always mentioned by elementary writers, has not

<sup>1</sup> Robertson v. Columbian Ins. Co. 8 Johns. N. Y. 491.



been often recognized by courts, for the reason that a justification resulting so directly from the plainest principles of humanity, and in the sufficiency of which the assured and insurers are in general so much interested, has never been directly called in question, and the justification has been recognized and is irrevocably established in jurisprudence.<sup>1</sup>

1028. *Delay or going off the course merely to save the property of others, is considered to be a deviation.*<sup>2</sup>

## SECTION XII. TAKING LETTERS OF MARQUE. CRUISING. CONVOYING.

1029. *The taking of a letter of marque, without leave from the underwriters, is not of itself a deviation.*

It is, at most, as Mr. Marshall remarks, a temptation to deviate by cruising.<sup>3</sup>

After a decision to the contrary by Lord Kenyon and his associates,<sup>4</sup> the law has been definitely settled as above.<sup>5</sup>

1030. *A letter of marque can be used only for defence without leave from the underwriters : cruising or unnecessary delay of the voyage for hostile purposes is a deviation.*<sup>6</sup>

It was a matter of doubt whether a vessel, having liberty by the policy to be armed, nothing being said of her taking a letter of marque, but having taken one, was authorized by usage to chase vessels that hove in sight, or had, by altering her course

<sup>1</sup> See *Lawrence v. Sydebotham*, 6 East, 54; per Marshall, C. J. 2 Cranch, 258, n.; *Bond v. Brig Cora*, 2 Wash. C. C. 80; per Story, J., *Schooner Boston*, 1 Sumn. C. C. 328; *Ship Henry Ewbank*, 1 id. 400; *Foster v. Gardiner*, Amer. Jurist, No. 21, per Story, J.; *Little v. St. Louis Perpetual Mar. & F. Ins. Co.* 7 Mo. 379; *The Beaver*, 3 C. Rob. Adm. 292; *The Jane*, 2 Hagg. Adm. 338; *Box of Bullion*, Sprague, Dec. Dist. Ct. 57; *Crocker v. Jackson*, id. 141.

<sup>2</sup> *Bond v. Brig Cora*, 2 Wash. C. C. 80; *Mason v. Ship Blaireau*, 2 Cranch,

240; *Warder v. Goods, &c.* 1 Pet. Adm. 31; *Crocker v. Jackson*, Sprague, Dec. Dist. Ct. 141.

<sup>3</sup> Marshall, Ins. book 1, c. 7, s. 6, 2d ed. by Condry, 282.

<sup>4</sup> *Dennison v. Modigliani*, 5 Term, 580; and see his remarks, 6 id. 382.

<sup>5</sup> *Moss v. Byron*, 6 Term, 379; *Wiggin v. Amory*, 13 Mass. 118; *Same v. Boardman*, 14 id. 12; *Jarratt v. Walker*, 1 Campb. 277.

<sup>6</sup> *Cook v. Townson*, Park, Ins. 448; *Jolly v. Walker*, *ibid.*; 3 Kent, Comm. 3d ed. 312, &c.

about a quarter of a point and giving chase for about a quarter of an hour to a Spaniard that hove in sight, forfeited its insurance. A special jury found it to be a deviation, and the verdict was approved by Lord Ellenborough and his associates;<sup>1</sup> and such is without doubt the established doctrine.

The stopping by an American vessel for three hours, to take possession of a recaptured vessel, was held in Massachusetts, in the strongly contested case of the *Volant*, to be a deviation. No time was taken for the recapture.<sup>2</sup> It was held to be a deviation, notwithstanding the knowledge, on the part of the underwriters, that the vessel had a commission as a privateer.

The decisions in the cases last cited turn upon the construction of the evidence that the master went beyond acts of mere defence, from motives of gain by the recapture. In a subsequent trial in the same court between a shipper and a ship-owner, before Parker, C. J., the evidence in defence presented a new phase; namely, that taking possession of the recaptured vessel was also a defensive measure, for the purpose of preventing intelligence of the course of the *Volant* to British cruisers, whereby she might have been exposed to capture, so that an opposite verdict was given, though the doctrine stated by the court was the same.<sup>3</sup>

In a trial before Mr. Justice Story, on a policy upon goods on board of the same vessel, he instructed the jury that the question was "whether what was done was fairly attributable to a mere intention of self-defence;" and he said, "If the capture was made in self-defence, the master had a right to take possession of his prize, and if, without injuriously weakening his own crew, he could man the prize, he had a right so to do, and the delay for that purpose was not a deviation."<sup>4</sup> The whole question is one of the construction of facts as to what acts are merely defensive.

Lord Ellenborough and his associates decided that, under a policy upon a ship from L. to the coast of Africa and thence to

<sup>1</sup> *Parr v. Anderson*, 6 East, 202; 2 Smith, 316; *Park, Ins.* 450.

<sup>2</sup> *Wiggin v. Amory*, 13 Mass. 118; 1817.

<sup>14</sup> *id.* 1; *Wiggin v. Boardman*, *id.* 12.

<sup>3</sup> *Gray v. Thorndike*, (MS.) Sup. Jud. Ct. Mass. Suffolk, November,

<sup>4</sup> *Haven v. Holland*, 2 Mas. C. C. 230.

the West Indies, with letters of marque, and "leave to chase, capture, and man prizes," the shortening sail and lying to occasionally to convoy the prizes taken was a deviation;<sup>1</sup> but it is not so, if the vessel does not delay or go off her course for the purpose.<sup>2</sup>

Lord Mansfield and the other judges of his court considered leave to cruise a certain number of weeks to mean so many successive weeks, and held cruising at different periods to be a deviation.<sup>3</sup>

A ship being insured in London, "thence to the southern whale and sea fishery, and back," with letters of marque, and leave "to chase, capture, and man, return with, and send into port prizes, also to cruise thirty-one days on this side of Cape Horn," was held by Sir James Mansfield and the other judges of the English Common Pleas, to have deviated by remaining off San Blas, in California, for nine days, waiting for an enemy vessel to come out, being, during the time, on fishing ground, though not the best.<sup>4</sup> The delay on ground not the best for fishing, was considered by the court to be equivalent to cruising, as distinguished from chasing.

Lord Ellenborough ruled that, on a voyage similar to the preceding, leave to capture, man, and see into port prizes, did not authorize delay in port while a prize was under repair.<sup>5</sup>

#### SECTION XIII. DEPARTURES FROM THE ROUTE, DELAYS, AND CHANGES OF THE RISK, NOT IMPUTABLE TO THE ASSURED.

1031. We have seen that, in respect to deviation, the acts of the master and other representatives of the assured appointed by him, or whose appointment is authorized by him, are imputable to him, except in cases of barratry where that is one of the risks insured against.

*If, in consequence of disaster, the insured subject is transferred to the hands of strangers, their acts are not imputable to the assured, and what would otherwise be a deviation will cease to be such:*

<sup>1</sup> Lawrence v. Sydebotham, 6 East,

54.

<sup>2</sup> Ward v. Wood, 13 Mass. 539.

<sup>3</sup> Syers v. Bridge, Dougl. 529.

<sup>4</sup> Hibbert v. Haliday, 2 Taunt. 428.

<sup>5</sup> Jarratt v. Ward, 1 Campb. 263.

As in case of a vessel and cargo being put into the hands of the American consul at the Mauritius in consequence of the death of the master and officers.<sup>1</sup>

## SECTION XIV. CHANGES OF THE RISK IN FIRE POLICIES.

1032. Fire policies, as we have seen,<sup>2</sup> usually contain *provisions relative to alterations of the buildings insured, or other enhancement or change of the risk*, whereby it is stipulated that the policy shall be forfeited.

Under the general provision, that, "if, after the insurance is affected, the risk of the property shall be increased by any means within the control of the assured, such insurance shall be void," the Court of Appeals of New York held that the erection of a barn so near to the insured building as to enhance the risk, would incur a forfeiture of the insurance.<sup>3</sup>

1033. In fire insurance, as well as marine, *the assured may incur whatever additional risk he pleases, without prejudicing his contract, provided a loss occasioned by the additional risk can be distinguished from one happening independently of it.*<sup>4</sup>

1034. *Requisite repairs, such as come within the ordinary acts of ownership, may be made in the insured building, where there is no express provision in the policy requiring the consent of the insurers, or making any other condition on the subject.*<sup>5</sup>

1035. *If any change made in the subject is such as to render it a different one from that described in the policy, the underwriters will be wholly discharged from liability.*

1036. *So if any such alteration of the subject is voluntarily made by the assured that it cannot be distinguished whether a loss has been occasioned thereby, the underwriters are not liable*

<sup>1</sup> Winthrop v. Union Ins. Co. 2 Wash. C. C. 7.

<sup>2</sup> Chap. 1, s. 6.

<sup>3</sup> Murdock v. Chenango Mut. Ins. Co. 2 N. Y. 210; Acts of third parties are not within this provision: Sanford v. Mechanics' Ins. Co. 12 Cush. Mass. 541.

<sup>4</sup> Stebbins v. Globe Ins. Co. 2 Hall, N.Y. 632; Howard v. Kentucky Ins. Co. 13 B. Monr. Ky. 282; Joyce v. Maine Ins. Co. 45 Me. 168; Girard Ins. Co. v. Stephenson, 37 Penn. St. 293.

<sup>5</sup> Jolly v. Baltimore Ins. Co. 1 Harr. & G. Md. 294.



for such loss.<sup>1</sup> What is the effect of any alteration is a fact for the jury,<sup>2</sup> in the particular case.

1037. *An alteration whereby the character of the building is not changed, nor the risk from fire increased, does not discharge the insurers from subsequent liability.*<sup>3</sup>

1038. *Under a policy on goods in a certain building, the enhancement of the risk by the manner of the occupancy in other respects, whereby the risk of fire is enhanced, does not discharge the underwriters on the principle of deviation or change of risk merely,*<sup>4</sup> though it may have that effect on the ground of an express warranty, or an implied representation in the description of the subject or locus in quo, in the policy.

A building being insured as a "dwelling-house," its being occupied as a boarding-house, was held not to discharge the underwriters.<sup>5</sup>

And the same point was held where a building insured as a "hotel" was used as a house of ill fame.<sup>6</sup>

The underwriters were held not to be discharged by the circumstance that an insured building, stated to be occupied as a "private residence," was vacant for a time.<sup>7</sup>

Moving the goods insured to another place is a change of risk.<sup>8</sup>

Drawing a lottery in a "shoe manufactory" is held not to defeat the policy.<sup>9</sup>

<sup>1</sup> *Stetson v. Mass. Mut. Fire Ins. Co.* 4 Mass. 330; *Francis v. Somerville Ins. Co.* 1 Dutch. N. J. 78.

<sup>2</sup> *Grant v. Howard Ins. Co.* 5 Hill, N. Y. 10; *Merriam v. Middlesex Mut. Fire Ins. Co.* 21 Pick. Mass. 162; *Shepherd v. Union Ins. Co.* 38 N. H. 232.

<sup>3</sup> *Curry v. Commonwealth Ins. Co.* 10 Pick. Mass. 535; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. N. Y. 72; *Perry Ins. Co. v. Stewart*, 19 Penn. St. 45; *Schenck v. Mercer Ins. Co.* 4 Zab. N. J. 447; *Baxendale v. Harvey*, 4 Hurlst. & N. Exch. 445. A mortgage is a material alteration: *Edmands v. Mutual*

*Ins. Co.* 1 All. Mass. 311; contra, *Howard Ins. Co. v. Bruner*, 23 Penn. St. 50.

<sup>4</sup> *Lyon v. Commercial Ins. Co.* 2 Rob. La. 266.

<sup>5</sup> *Rafferty v. New Brunswick Fire Ins. Co.* 3 Harr. N. J. 480.

<sup>6</sup> *Hall v. People's Ins. Co.* 6 Gray, Mass. 185.

<sup>7</sup> *O'Neil v. Buffalo Fire Ins. Co.* 3 N. Y. 122; *Ganwell v. Merchants' Ins. Co.* 12 Cush. Mass. 167.

<sup>8</sup> *Spitzer v. St. Mark's Ins. Co.* 6 Du. N. Y. 6.

<sup>9</sup> *Boardman v. Merrimack Ins. Co.* 8 Cush. Mass. 583.

SECTION XV. CHANGES OF THE RISK IN LIFE POLICIES.

1039. *The doctrines of the preceding sections respecting an enhancement or change of the risk, have no application to life insurance except under an express provision in the policy.*

Such provisions are usually introduced into this species of policy, and are considered under the head of express warranty.<sup>1</sup>

SECTION XVI. WAIVER OF A FORFEITURE INCURRED BY DEVIATION.

1040. *The forfeiture of a claim under a policy incurred by deviation may be waived in writing;*<sup>2</sup> but not by a merely verbal consent to waive it after it has occurred.<sup>3</sup>

1041. Mr. Justice Washington expressed the opinion, that *the forfeiture was cancelled by the fact of a previous deviation being known* to the underwriters at the time of subscribing the policy,<sup>4</sup> and the doctrine is recommended by its equitableness. The strongest ground on which to maintain it seems to be, that the underwriter shall not be permitted to allege his own fraud in defence, since it would be a palpable fraud on his part to subscribe and receive the premium, intending at the same time to avoid payment of a loss by alleging the previous deviation *or one represented to be intended*.

In a case above cited,<sup>5</sup> Gibbs, C. J., expressed his regret on account of not being, as he thought, authorized to exclude the defence of a deviation, which had been known to the underwriter at the time of subscribing. But a forfeiture by non-compliance with a warranty implied by the fact of making the policy, and not by its phraseology, has been said to be saved by a representation,<sup>6</sup> which is an analogous case.

<sup>1</sup> Supra, c. 9, s. 11, No. 891.

<sup>4</sup> Coles v. Marine Ins. Co. 3 Wash.

<sup>2</sup> Glidden v. Manufacturers' Ins. Co. C. C. 159.

<sup>3</sup> Sumn. C. C. 232.

<sup>5</sup> Redman v. Lowdon, 5 Taunt. 462;

<sup>6</sup> Crowningshield v. New York Ins. Co. 3 Johns. Cas. N. Y. 142.

<sup>3</sup> Marsh. 136, and 3 Campb. 503.

<sup>6</sup> Supra, c. 8, s. 5, No. 752.

## CHAPTER XIII.

### RISKS COVERED.

- SECT. 1. Of the risks covered generally.
2. Acts of the assured and his agents.
  3. Barratry.
  4. The insurers are not liable for ordinary perils and losses.
  5. Damage arising from the qualities of the subject.
  6. Events which enhance the risk.
  7. Loss by fire.
  8. Perils of the seas, rivers, lakes.
  9. Piracy, robbery, theft.
  10. Capture, arrests, restraints, and detentions.

- SECT. 11. Risks from prohibited and contraband trade.
12. Other perils. General clause.
  13. Loss from fear of perils.
  14. Of remote and consequential losses. Concurrence of different perils. Loss upon one subject by damage to another.
  15. What losses are within the period of the risk.
  16. Risks excepted.
  17. Risks in bottomry interest.

#### SECTION I. OF THE RISKS COVERED GENERALLY.

1042. THE species of risks most usually insured against in marine policies *are perils of the seas, fire, piracy and theft, barratry, capture, arrests, and detentions*: and to this specification is commonly added the general clause "all other perils,"<sup>1</sup> which is restricted to perils like in kind to those enumerated, and adds but little to the indemnity secured by the specific enumeration.

1043. *A policy will not secure indemnity* in favor of a party who cannot be legally insured,<sup>2</sup> or on any subject which cannot be legally held, or on a trade which cannot be legally prosecuted, *or against risks in respect to which indemnity is prohibited* by law, or in direct contravention of the implication, spirit, and policy of the laws.<sup>3</sup>

Lord Chancellor Lyndhurst, in the case of *Fontleroy*, laid down the doctrine, that an insurance in favor of an assured and his representatives, on his life, against felonious suicide, is void, as being in contravention of the policy of the law; and the

<sup>1</sup> See *supra*, No. 35.

<sup>2</sup> See *supra*, c. 2, s. 2.

<sup>3</sup> See *supra*, c. 3, s. 2.

decision in the House of Lords was in accordance to that opinion.<sup>1</sup>

But where a law is a commercial regulation, wholly collateral to the risks insured against, a non-compliance with which does not enhance or change the risks, the insurance is valid notwithstanding such non-compliance : <sup>2</sup>

As in case of a law regulating pilotage : <sup>3</sup>

And of one requiring a shipping-paper signed by the master and men : <sup>4</sup>

And of one regulating the stowage of water under deck.<sup>5</sup>

So, if a non-compliance is merely incidental and collateral to the voyage and the risks, the policy remains valid, on the same principle as where the law itself is merely collateral.<sup>6</sup>

1044. The rate of premium paid has been taken into consideration as a ground of presumption as to the extent of the risks assumed.<sup>7</sup>

1045. The commencement and termination of the risk are the subjects of a previous chapter. What losses by the perils insured against come within that period, will be the subject of a subsequent section.

There are, as we shall see, cases in which the action of the peril is not fully realized until after the policy attaches, though its operation began previously ; and vice versâ, there are cases where the effects of a peril do not come out fully until after the period of the risk has ended. Again, there are cases in which a peril not insured against, and one that is insured against, concur in their operation, and give rise to the question to which of the two the loss is to be attributed. These inquiries are postponed until we shall have investigated the several enumerated perils.

Before going into the investigation of the losses by the several

<sup>1</sup> *Amicable Ins. Co. v. Bolland*, 2 Dow & C. Hou. L. 1.

<sup>2</sup> See *supra*, c. 3, s. 2.

<sup>3</sup> *Keeler v. Firemen's Ins. Co.* 3 Hill, N. Y. 250 ; *Flanigan v. Washington Ins. Co.* 7 Penn. St. 307.

<sup>4</sup> *Redmond v. Smith*, 7 Mann. & G. 457. The judgment in favor of the vendor for the price of tobacco sold by him in contravention of the law prohib-

iting trade in the article, except by a party having a license, is similar in principle. *Johnson v. Hudson*, 11 East, 180.

<sup>5</sup> *Deshon v. Merchants' Ins. Co.* 11 Metc. Mass. 199.

<sup>6</sup> See *supra*, No. 221.

<sup>7</sup> *Maryland & Phoenix Ins. Co. v. Bathurst*, 5 Gill & J. Md. 159.



perils usually insured against, for which the insurers are liable, and as preliminary thereto, we will consider what aggravation of the perils and causes of loss, and what losses by those perils generally, are at the risk of the assured, notwithstanding the insurance; namely, acts of the assured, ordinary action of the enumerated perils, wear and tear, and natural decay. We will also first consider the aggravations of the enumerated perils subsequent to the time of the policy's attaching, which are at the risk of the insurer.

Barratry, which is usually an induction of other enumerated perils, or an act whereby indemnity under the policy would be forfeited, if this risk were not covered, will be more conveniently treated of in connection with the acts of the assured or his agents for which the insurer is not liable, in which connection it is accordingly put, and precedes the consideration of the perils through which indiscriminately this risk of barratry may operate on the insured subject.

1045 a. Policies against fire on land usually cover that risk only.<sup>1</sup>

1045 b. *A life policy is an insurance against death indefinitely, or for a certain period of time.* All descriptions of risks and perils — that is, causes of death — are rarely, if ever, insured against in these policies.

The causes of death insured against are sometimes enumerated. A life policy against "the dangers incident to navigation, drowning, blowing up, &c.," on a passage upon the Mississippi, is held in Missouri to cover the risk of drowning by accidentally falling overboard, though the occasion was not extraordinary.<sup>2</sup>

A life policy is, however, usually in form an insurance against death generally, with exceptions of death by certain causes or under certain circumstances.<sup>3</sup>

<sup>1</sup> See *supra*, No. 63, and *infra*, No. 1094 to 1098, also No. 1062 a.

<sup>3</sup> See excepted risks, *infra*, No. 1162 b.

<sup>2</sup> *Moore v. Perpetual Ins. Co.* 16 Mo. 98.

## SECTION II. ACTS OF THE ASSURED AND HIS AGENTS.

1046. *The underwriter is not liable to indemnify the assured for losses by the perils insured against directly incurred through the fraud or gross misconduct of the assured.*<sup>1</sup>

A contract for indemnity in such case would be absurd, and, so far as it related to a voluntary and intended loss, void at law.<sup>2</sup> But where a loss by the perils insured against may have been remotely occasioned by the fault or negligence, or want of the greatest degree of vigilance, prudence, and forecast of the assured acting bonâ fide and without being aware of such consequence, there are not wanting authorities establishing the liability of the underwriters to make indemnity. The limit of such liability will be found not to be very definitely marked. It undoubtedly does not extend beyond the effects of the bonâ fide acts of the assured, if it extends to all such acts.<sup>3</sup>

The underwriter does not run the risk of the obstructions and embarrassments directly occasioned by the debts of the assured;<sup>4</sup> or for the aggravation of a loss by reason of his neglect to supply the master with funds or credit to a reasonable amount at a foreign port;<sup>5</sup> or for the aggravation of a loss by his neglect to pay salvage due to salvors for saving wheat in case of disaster;<sup>6</sup> or for a constructive total loss of a vessel, which would have been only a partial one, but for the assured's neglecting, without good reason, to make repairs;<sup>7</sup> or for the loss of cargo consumed by the crew, the owner having neglected to put proper supplies on board.<sup>8</sup>

1046 a. The underwriter is liable for losses by the perils insured against, though in consequence of the negligence of the insured, if it does not amount to gross negligence or wilful misconduct.<sup>9</sup>

<sup>1</sup> Thompson v. Hopper, 6 Ell. & B. 172; 34 Eng. L. & Eq. 266.

<sup>2</sup> Amicable Society v. Bolland, 2 Dow & C. Hou. L. 1.

<sup>3</sup> Citizens' Ins. Co. v. Marsh, 41 Penn. St. 386.

<sup>4</sup> La Guidon, c. 2, a. 7.

<sup>5</sup> Amicable Ins. Co. v. Ogden, 20 Wend. N. Y. 287.

<sup>6</sup> Rosetto v. Gurney, 11 C. B. 176; 7 Eng. L. & Eq. 461.

<sup>7</sup> Cincinnati & Firemen's Ins. Co. v. May, 20 Ohio, 211.

<sup>8</sup> Morse v. Sun Ins. Co. 1 Du. N. Y. 159.

<sup>9</sup> Johnson v. Berkshire Ins. Co. 4 All. Mass. 388; Theobald v. Railway Ass. Co. 10 Exch. 45; 26 Eng. L. & Eq. 432.

1047. *The underwriter may undoubtedly make himself liable to indemnify the assured against the fraud, misconduct, and negligence of his agents*; and the only question in this respect is, whether the contract is so framed as to impose upon him this responsibility. By the common form of the policy, the master of the vessel and the mariners are the only agents against whose misconduct the assured is protected; and the only acts of the master and mariners expressly insured against are those which amount to barratry. In some places, the common form of the policy makes a distinction, in respect to this risk, between an insurance on the ship or freight, and one upon the cargo or profits; barratry being insured against in the latter, but not in the former case.<sup>1</sup>

1048. The doctrine is frequently laid down, that the insurer is not answerable, under the common form of the policy, for losses occasioned through the fault of agents employed by the assured.<sup>2</sup>

The course of jurisprudence formerly imposed upon the assured a very broad responsibility for the acts of his agents; and it was held that "the insurers are not liable for losses arising from the mistakes of the owner or master;"<sup>3</sup> and that "the act of the master must be referred to his principal who appoints him; and whenever a loss happens through the master's fault, unless that fault amounts to barratry, the owner, and not the insurer, must bear it."<sup>4</sup> But this seems to be too broad an exemption of the insurers from responsibility.

"*Whether,*" says Mr. Justice Story, "*the underwriters are liable for a loss by any of the perils in the policy, the remote cause of which is the negligence and misconduct of the master and mariners, not amounting to barratry, is a vexed question, upon which opposite opinions have been expressed by very distinguished courts.*"<sup>5</sup>

<sup>1</sup> Lafond's Guide to Insurers and Assured, Paris, 1837, p. 97. In the Antwerp policies, the underwriters insure against the negligence of the master and crew.

<sup>2</sup> 1 Emerigon, 604, c. 12, s. 39.

<sup>3</sup> Goix v. Low, 1 Johns. Cas. N. Y. 341. See also Tatham v. Hodgson, 6 Term, 656; Stewart v. Tennessee Ins. Co. 1 Humph. Tenn. 242; and Himely v. Stewart, 1 Brev. So. C. 209; How-

land v. Marine Ins. Co. of Alexandria, 2 Cranch, C. C. 473; Lodwicks v. Kennedy, 5 Ohio, 436, which is a case of damage to goods in a flat-boat on the Mississippi.

<sup>4</sup> Vos v. United Ins. Co. 2 Johns. Cas. N. Y. 187. Contra Fireman's Ins. Co. v. Powell, 13 B. Monr. Ky. 311.

<sup>5</sup> Andrews v. Essex Mar. Ins. Co. 3 Mas. C. C. 6.

1049. *The better and now established doctrine is, that the underwriters are liable for a loss occasioned by a risk expressly insured against, though it is a consequence of the negligence or mistake of the master or mariners; supposing the ship to have been provided with a competent master and crew, and that there is no want of good faith and honesty of purpose.*

Lord Mansfield instructed the jury, "that, if they were satisfied the captain had done what was for the benefit of all concerned," they must find in favor of the claim of the assured;<sup>1</sup> meaning, as Mr. Chief Justice Dallas of the English Common Pleas explains the ruling, if he had acted with a view to the common benefit;<sup>2</sup> or, in other words, if he had acted in good faith, and not fraudulently, the underwriters are answerable for the perils insured against, however the operation of those perils may have been affected by the measures taken by the master.<sup>3</sup>

This doctrine has been illustrated in divers cases:

As in case of a vessel burnt at Gibraltar in consequence of the master's carelessness in using a light in sealing letters, and unnecessarily discouraging the men from extinguishing the fire through fear of the explosion of gunpowder:<sup>4</sup>

And of a Russian ship frozen up during the winter in Biorkoo Sound, in the Gulf of Finland, and burnt in consequence of the master's carelessly leaving a fire in the cabin:<sup>5</sup>

And loss by fire on board of a steamboat through negligence:<sup>6</sup>

And loss on board of a steamboat employed in river navigation, in consequence of an explosion occasioned by negligence:<sup>7</sup>

And the stranding of a ship in the river of Sierra Leone, in

<sup>1</sup> 2 Doug. 231.

<sup>2</sup> *Idle v. Royal Exch. Ass. Co.* 3 J. B. Moore, 115.

<sup>3</sup> See also *Amicable Ins. Co. v. Insley*, 7 Penn. St. 223; and *Shore v. Bentall*, 7 Barnew. & C. 798, n.; *Bishop v. Pentland*, 7 Barnew. & C. 219; *Cincinnati & Firemen's Ins. Co. v. May*, 20 Ohio, 211.

<sup>4</sup> *Patapseo Ins. Co. v. Coulter*, 3 Pet. 222. A contrary decision was made in a very similar case in New York, of a vessel laden with gunpowder, blown up

by a candle carelessly put near the binacle. *Grim v. Phoenix Ins. Co.* 13 Johns. N. Y. 451. See *Emerigon*, tom. 1, p. 441, c. 12, s. 18.

<sup>5</sup> *Busk v. Royal Exch. Ass. Co.* 2 Barnew. & Ald. 73.

<sup>6</sup> *Waters v. Merchants' Ins. Co.* of Louisville, 1 M'Lean, C. C. 275.

<sup>7</sup> *Perrin's Adm'rs v. Protection Ins. Co.* 11 Ohio, 147, overruling prior cases of *Howell v. Cincinnati Ins. Co.* 7 Ohio, 276; and *Fulton v. Lancaster Ins. Co.* id. part 2, p. 5.



consequence of injury by the carelessness or unskilfulness of the sailors and some natives, such as were usually employed on like service, in putting on board the cargo :<sup>1</sup>

And the master's landing and selling a damaged cargo, and so breaking up the voyage, acting in good faith and according to the apparent circumstances :<sup>2</sup>

And damage to tin by reason of improper stowage and negligence :<sup>3</sup>

And loss of goods on board of a sloop at St. Kitts, on the way to be loaded on board of the ship, the goods being lost by the wreck of the sloop through the carelessness or mismanagement of the mate of the ship and the men having charge of it :<sup>4</sup>

And loss by the plug being negligently left out of the water-pipe of a steamboat :<sup>5</sup>

And loss in consequence of the vessel having, after the risk had commenced, become unseaworthy, or remained so, through the negligence or mistake of the master :<sup>6</sup>

And loss by the vessel being blown over, in consequence of the master's discharging ballast :<sup>7</sup>

And loss on a vessel by being blown over through want of skill in the mechanics employed on a marine railway on which it is hauled up for repairs, there being no fault or negligence of the owner or master in employing the mechanics :<sup>8</sup>

And a loss in consequence of a press-gang impressing two mariners sent on shore to make fast a line :<sup>9</sup>

And a loss by the master's contravening a penal law by sailing without convoy, without the privity of the owner :<sup>10</sup>

And occasion given for the loss by the master's persisting in

<sup>1</sup> *Redman v. Wilson*, 14 Mees. & W. Exch. 476.

<sup>2</sup> *Jordan v. Warren Ins. Co.* 1 Stor. C. C. 342.

<sup>3</sup> *Georgia Ins. & Trust Co. v. Dawson*, 2 Gill, Md. 365.

<sup>4</sup> *Walker v. Maitland.* 5 Barnew. & Ald. 171.

<sup>5</sup> *Dupeyre v. Western Mar. & Fire Ins. Co.* 2 Rob. La. 457.

<sup>6</sup> See cases cited supra, No. 733; *Holdsworth v. Wise*, 7 Barnew. & C. 794.

<sup>7</sup> *Sadler v. Dixon*, 8 Mees. & W. Exch. 895; *Dixon v. Sadler*, 5 id. 414.

<sup>8</sup> *Ellery v. New England Mar. Ins. Co.* 8 Pick. Mass. 14.

<sup>9</sup> *Hodgson v. Malcolm*, 5 Bos. & P. 336. Sir J. Mansfield, C. J., dissenting.

<sup>10</sup> *Carstairs v. Allnutt*, 3 Campb. 497; *Metcalf v. Parry*, 4 id. 123; *Cohen v. Hinckley*, 1 Taunt. 249; *Henderson v. Hinde*, id. 250, n.; and see 1 Arnould, Mar. Ins. 719.

asserting and maintaining the rights of his owners and a national right in good faith on reasonable grounds, against threats of lawless violence; as where the master persisted in the seal-fishing business near the Falkland Islands, notwithstanding a prohibition and threats of violent interposition by Vernet, who claimed to be governor of the Islands by virtue of an appointment under the government of Buenos Ayres, whose jurisdiction was denied by the United States.<sup>1</sup>

Such are the results of the jurisprudence on this subject, whereby the doctrine, though for a time negatived and in suspense, is at length definitively established, that, where there is no express stipulation to the contrary, and no prior forfeiture of the policy, the insurers are liable for loss by the direct operation of a peril insured against upon the subject, though it is occasioned through the mistake, negligence, or carelessness of the master, acting in good faith, or of the crew, where a competent master and crew were provided in the outset. This is so where the master and crew are the same that were originally provided, and, for a still stronger reason, where the subject has been transferred to the care of strangers in consequence of disasters.

1050. *This doctrine is limited to the acts and neglects of the master and crew as such, in conducting the voyage, or in charge of the subject. It intercepts and prevents a forfeiture of the insurance by reason of unseaworthiness resulting from, or continuing by reason of, carelessness or mistake of the master or crew, but it does not prevent a forfeiture by deviation,*<sup>2</sup> which is in effect a violation of an express stipulation of the policy, implied by the mere description of the voyage. *Nor does it prevent a forfeiture by a non-compliance with any express stipulation by an act or neglect of the master and men appointed by the assured.*

1051. *The insurers are not answerable for loss by acts done in bad faith, and in contravention of law, or for loss by malversation,*

<sup>1</sup> Williams v. Suffolk Ins. Co. 3 Sumn. C. C. 270; S. C. 13 Pet. 415. See also the case of the Henrick and Maria, 1 C. Rob. Adm. 146, where the master persisted in proceeding to his port of destination after its blockade was notified to him by a belligerent cruiser, there being in fact no blockade legally maintained at the time.

<sup>2</sup> Natchez Ins. Co. v. Stanton, 10 Miss. 340; and cases on deviation generally, c. 11.

*or gross ignorance and recklessness* in discharge of his trust on the part of the master or other agent of the assured, except where loss by barratry is covered :

As for loss by condemnation of a vessel on account of resistance against search legally demanded, or attempt of rescue by the crew, the vessel being sent in by belligerent captors for examination ;<sup>1</sup> though illegal violence may be legally resisted without forfeiting the insurance :<sup>2</sup>

Or loss by the ship being burnt by the authorities at Marseilles, the vessel having been permitted to come up to the town on a false bill of health, whereby the plague was supposed to have been spread among the inhabitants :<sup>3</sup>

Or for loss by condemnation of the vessel for an attempt knowingly to violate blockade :<sup>4</sup>

Or for loss by damage to goods by a leak occasioned by a water-pipe being burst, in consequence of water being carelessly left in it and frozen :<sup>5</sup>

Or for detention in consequence of a mistake in the manifest, inducing a suspicion of smuggling :<sup>6</sup>

Or for loss of neutral goods condemned in consequence of belligerent goods being mixed with them by the master, in the invoice and bills of lading, as neutral :<sup>7</sup>

Or for loss of a vessel injured by being blown over in being hauled up on a marine railway, in consequence of the captain's misdescribing the shape of the vessel to the superintendent :<sup>8</sup>

Or for loss by the master's leaving his register on shore :<sup>9</sup>

Or for loss by capture consequent on the master's unnecessarily sailing in a direction off his course ninety degrees :<sup>10</sup>

<sup>1</sup> Robinson v. Jones, 8 Mass. 536 ;  
and see 9 Cranch, 63 ; and Robinson's  
Col. Mar. 12, 18, 163.

<sup>2</sup> Williams v. Suffolk Ins. Co. 3  
Sumn. C. C. 270 ; S. C. 13 Pet. 415 ;  
The St. Juan Baptista, 5 C. Rob. Adm.  
33.

<sup>3</sup> Emerigon, tom. 1, p. 434, c. 12,  
s. 17.

<sup>4</sup> Harratt v. Wise, 9 Barnew. & C.  
712 ; Winder v. Wise, 1 Dowl. & L.  
240 ; Naylor v. Taylor, 9 Barnew. & C.  
718.

<sup>5</sup> Siordet v. Hall, 4 Bingh. 607.

<sup>6</sup> Bradford v. Levy, 2 Carr. & P. 137 ;  
Ry. & M. 331.

<sup>7</sup> Coffin v. Newburyport Ins. Co. 9  
Mass. 436.

<sup>8</sup> Ellery v. New England Mar. Ins.  
Co. 8 Pick. Mass. 14.

<sup>9</sup> Cleveland v. Union Ins. Co. 8 Mass.  
308.

<sup>10</sup> Phyn v. Royal Exch. Ass. Co. 7  
Term, 505 ; otherwise, if he fairly chooses  
the less direct course. Brazier v. Clap,  
5 Mass. 1. See also Gregson v. Gilbert,  
3 Dougl. 232.

Or if the captain grossly neglects to put into port for repairs.<sup>1</sup>

The insurer may expressly assume the risk of such fraud, negligence, or mismanagement, as he in fact does the risk of fraud by insuring against barratry. Otherwise he is not responsible for loss thereby occasioned independent of the perils insured against.

1052. *The liability of the ship-owner for a loss on the cargo by the fault of the master and crew, does not necessarily exonerate the underwriters.*<sup>2</sup>

This is plainly illustrated in the cases above cited, and the rule sometimes inadvertently stated, that the responsibility of the insurer begins where that of the ship-owner ceases,<sup>3</sup> is plainly erroneous. In such a case, where the assured abandons the goods, he is bound, as we shall see, to assign to the underwriters his claim against the ship-owner.

1053. *If the damage can be accounted for by the perils of the seas, it will be presumed to have so happened, unless it is proved to have been caused by culpable misconduct :*

As where the vessel was damaged by taking the ground in the shallow harbor of Newport, in England, in which vessels of like draft usually took the ground at low water without injury ; it appearing that, under the circumstances, the vessel's bottom might have been injured without any fault of the master and crew.<sup>4</sup>

1054. Whatever extent is to be given to the responsibility of the assured for the acts of his agents, the doctrine will present the questions, who are such, and in respect to what acts they are such ; and *it is a general rule, that a principal is answerable only for those acts of his agent which are done in pursuance of the authority, and in the exercise of the discretion, with which the agent is invested.*<sup>5</sup>

A master appointed by the owner of a chartered vessel is the agent of the owner.<sup>6</sup>

1055. *In some instances the same person acts as the agent of*

<sup>1</sup> Cudworth v. South Carolina Ins. Co. 4 Rich. So. C. 416.

<sup>2</sup> Cullen v. Butler, 5 Maule & S. 461.

<sup>3</sup> Natchez Ins. Co. v. Stanton, 10 Miss. 340, and in divers other cases.

<sup>4</sup> Potter v. Suffolk Ins. Co. 2 Sumn. C. C. 197.

<sup>5</sup> See *infra*, c. 23, s. 2 and 3.

<sup>6</sup> Pervis v. Tunno, 1 Brev. So. C. 261.



*both parties, which gives rise to the question, in what respects and by what acts he represents one or the other.*

An agent of a life insurance company, who acted for the company in his neighborhood, was requested by the person proposing a life, to do what was necessary in effecting the policy. The agent did not refer to the physician required by the rules and regulations of the company; and the question was made, whether he was to be considered the agent of the assured or of the underwriters. In this particular, he was to be considered the agent of the assured.<sup>1</sup>

1056. *The owner of a ship constitutes the master and mariners his agents for the navigation of the ship, and thereby renders himself answerable for their conduct in this respect; but if, while they are engaged in this employment, they commit theft, or do an act of violence which is nowise connected with this employment, and is not an act done in pursuance and as a part of such employment, this does not concern the owner.*

This distinction is recognized in many instances; but the principles of its application to particular cases do not seem to have been very definitely settled. It is plain that the master is an agent of the owners, both of the ship and the cargo, to more purposes than the mariners are so. Chief Justice Gibbs has also glanced at a distinction, in this respect, between the owners of the ship and the owners of the cargo. Speaking of a loss by the misconduct of the master and mariners, he says: "It is extremely hard that the owner of goods should be responsible for a loss occasioned by an act in which he did not concur, and by which he was alone the sufferer."<sup>2</sup> Sir William Scott notices the same distinction.<sup>3</sup> But upon what principles, and to what extent, such a distinction is to be made, has not been definitely determined.

The owners of the ship are the agents of the shipper for transporting the goods, for which purpose they employ other agents, namely, the master and mariners, for whose conduct in this employment they are answerable in a greater or less degree to the shipper; and, as before remarked,<sup>4</sup> the liability of the ship-

<sup>1</sup> Everett v. Desborough, 5 Bingh. 503.

<sup>3</sup> The Adonis, 5 C. Rob. Adm. 256.

<sup>2</sup> Soares v. Thornton, 7 Taunt. 627;  
<sup>1</sup> J. B. Moore, 373.

<sup>4</sup> Supra, No. 1052.

owner to the shipper does not negative that of the underwriters on the cargo, though it is occasionally said or implied by judges that it does so.<sup>1</sup> In the cases already mentioned, and those to be noticed under barratry, where the insurers are liable for loss by the perils insured against through the negligence or misconduct of the master, the latter is responsible in damages to the ship-owner, and both the ship-owner and master are answerable to the shipper, and on payment of the loss on the goods, the insurer is entitled to an equitable assignment of the claim against the ship-owner and master, as will more distinctly appear in the chapter on total loss.

1057. *Where no peril expressly insured against supervenes, the insurers are not liable for loss or damage occasioned by the fraud, negligence, or mismanagement of the master or mariners, or any other agent of the assured:*<sup>2</sup>

As in case of blamable neglect of the master to transship the cargo, and thereby earn freight, after his vessel has been wrecked;<sup>3</sup> which loss is incurred only where the sum to be paid would be less than that by the original ship:<sup>4</sup>

Or in case of property insured as neutral not being claimed as such in a foreign prize court;<sup>5</sup> unless, under the right of abandonment, the master or other person having charge of the subject is the agent of the insurers and not of the assured:

Or in case of the voyage being broken up and the goods sold by the consignee on the ship being stranded, instead of being forwarded in lighters or by the same ship after it was got afloat.<sup>6</sup>

No peril expressly insured against supervenes after such mis-

<sup>1</sup> *Cleveland v. Union Ins. Co.* 8 Mass. 308.

<sup>2</sup> *Molloy*, b. 2, c. 2, s. 4; *Abbott*, c. 5; *Jacobsen's Sea Laws*, 95, b. 2, c. 1; *Tanner v. Bennett*, Ry. & M. 182. In Great Britain the owners are answerable to the shippers for damage of this description only to the amount of the value of the ship and freight. 7 Geo. II. c. 17; *Abbott on Shipp.* 262. The law in this respect is the same in Massachusetts. Stat. 1818, c. 122; Revised St. c. 32, s. 1; Gen. St. c. 52, s. 18.

<sup>3</sup> *Schieffelin v. New York Ins. Co.* 9 Johns. N. Y. 21; *Bradhurst v. Columbian Ins. Co.* id. 17.

<sup>4</sup> *Centre v. American Ins. Co.* 7 Cow. N. Y. 564; *American Ins. Co. v. Centre*, 4 Wend. N. Y. 45.

<sup>5</sup> *Vanderhevel v. United Ins. Co.* 2 Johns. Cas. N. Y. 127; *Gardere v. Columbian Ins. Co.* 7 id. 514; *Bohlen v. Delaware Ins. Co.* 4 Binn. Penn. 444.

<sup>6</sup> *Ludlow v. Columbian Ins. Co.* 1 Johns. N. Y. 335.

take or negligence of the consignee of the cargo, to whom, under such circumstances, less, rather than greater, indulgence is shown than to the master.<sup>1</sup>

1058. *The underwriters are liable for losses by the perils of the sea, occasioned by the negligence or mistakes of a duly commissioned public pilot, or those of mechanics and laborers properly in charge of the vessel.*

On this subject the following decision was given in the Court of King's Bench. A ship entered the port of Liverpool in charge of a pilot, who, in the absence of the master on business of the ship, and against the advice of the master, took her up to the pier of the dock basin, and fastened her there by a rope to the shore, intending that she should take the ground when the tide fell, which she did, and falling over on her side was bilged. In a suit on the policy upon the cargo, for damage occasioned by the bilging, Lord Ellenborough said: "The question is, whether what has happened is to be considered as having happened through the misconduct of the master and mariners, from which the underwriter is exempted. Now to make the pilot the representative of the master, and consequently to exempt the underwriter from liability for his acts, it must be shown that there is a privity between the master and the pilot, so that one may be considered as the representative or agent of the other. But does the master appoint the pilot? Certainly not. The regulations of the pilot act impose a penalty upon the master of every ship, which shall be piloted by any other person than a pilot duly licensed, within certain limits, for which pilots are appointed. Is it just that the master should be answerable for the misconduct of a person whose appointment the provisions of the law have taken out of his hands? There is no privity between them. It appears to me that the underwriter is liable."<sup>2</sup>

So the underwriters were held, in Missouri, liable for the loss of a steamboat, which was burnt when in dock for repairs, by the negligence of the workmen.<sup>3</sup>

1059. *The consignees of the cargo represent the assured on that subject more fully than the master does, merely as such.*

<sup>1</sup> See *infra*, No. 1059.

<sup>3</sup> *St. Louis Ins. Co. v. Glasgow*, 8 Mo.

<sup>2</sup> *Carruthers v. Sydebotham*, 4 Maule 713.

& S. 77.

It was ruled by Abbott, C. J., afterwards Lord Tenderden, that, where the agent of the owner of a vessel that had been stranded at the island of St. Thomas, in the West Indies, neglected to have it hove down, and examined, and a total loss ensued which might have been avoided, the insurers were not liable.<sup>1</sup>

Goods being insured from New York to Newbern, in North Carolina, the vessel was driven ashore at Ocracoke Point, about eight miles from Newbern, where the consignees ordered the goods to be sold, instead of having them carried forward, as they might have been, to Newbern, in the ship, after she was got afloat, or in lighters. The voyage was thus broken up, and the goods sold at a great loss; but the court was of opinion, that the assured had no claim upon the underwriters, there being no evidence of any actual damage to the goods in consequence of the vessel's running aground.<sup>2</sup>

A shipment of arms and ammunition being made at London for Madeira, in 1829, the consignee gave the governor of the island notice that such an importation was expected, under the impression that, unless such notice should be given, the articles might be seized and confiscated as having been shipped in pursuance of some revolutionary project, and that he himself might be imprisoned as having a concern in the importation. He expected, also, by this step, to obtain a restoration of the articles if they should be seized. The articles were included in the manifest and were not intended to be introduced clandestinely. They were seized before they had been landed. The insurers objected to the loss, on the ground that, but for the previous notice given by the consignee, the articles would not have been seized until after having been landed, in which case they should not have been liable for the loss. Lord Tenterden and his associates held that the insurers were liable.<sup>3</sup>

Goods consigned to Bremen were accepted by the consignees short of the port of destination, which occasioned the additional expense of lighters to transport them thither. Mr. Justice Yeates said: "These expenses must be ascribed to the agents of the as-

<sup>1</sup> *Tanner v. Bennett, Ry. & M.* 182.

<sup>3</sup> *Wilbraham v. Wartnaby, Lloyd &*

<sup>2</sup> *Ludlow v. Columbian Ins. Co.* 1 W. Cas. 144.

*Johns. N. Y.* 335.



sured, against whose acts there was no stipulated indemnity ;” and this was the opinion of the court.<sup>1</sup>

1060. We have seen that, with the exception of unlawful trade, parties may agree for indemnity against the acts of the government of the country to which the assured, or both the assured and the insurers, belong ;<sup>2</sup> whence it follows, that *the functionaries of the assured's own government are not his agents to the effect of rendering him responsible for their authorized acts in exoneration of his underwriters.*

Judicial functionaries are not excepted from this rule.<sup>3</sup>

Accordingly, it is not true, as has been sometimes alleged,<sup>4</sup> that every citizen is presumed to assent to the acts of his own government.

1061. The *insurers* are held, both in England and the United States, to be *liable for loss by fire occasioned by negligence.*<sup>5</sup>

### SECTION III. BARRATRY.

1062. Marine policies usually cover the risk of *barratry* ; which *is an unlawful, fraudulent, or dishonest act of the master, mariners, or other carriers, or of gross misconduct, or very gross and culpable negligence, contrary, in either case, to their duty to the owner, and that might be prejudicial to him or to others interested in the voyage or adventure.*<sup>6</sup>

<sup>1</sup> Low v. Davy, 5 Binn. Penn. 595.

<sup>2</sup> Supra, c. 10, No. 913, 914, 916.

<sup>3</sup> Francis v. Ocean Ins. Co. 6 Cow. N. Y. 404 ; Ocean Ins. Co. v. Francis, 2 Wend. N. Y. 64.

<sup>4</sup> Hornby v. Houlditch, 1 Term, 93, n.

<sup>5</sup> See cases supra, No. 1049 ; also infra, s. 7, contra, Grim v. Phœnix Ins. Co. 13 Johns. N. Y. 451, outweighed by other cases, 3 Kent, Comm. 3d ed. 304, n. a.

<sup>6</sup> Mr Justice Willes defines barratry to be “ every species of fraud or knavery in the master, by which the freighters or owners are injured.” Lockyer v. Offley, 1 Term, 252. And Lord Hard-

wicke defines it to be “ an act of wrong done by the master against the ship and goods.” Lewen v. Suasso, Postleth. Dict., art. Assurance. Mr. Justice Aston says, “ It comprehends every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighters are injured.” “ Whatsoever,” says Lord Mansfield, “ is, by the master, a cheat, a fraud, a cozening, or a trick, is barratry.” Vallejo v. Wheeler, Cowp. 143. Chief Justice Tilghman gives the same definition in Wilcocks v. Union Ins. Co. 2 Binn. Penn. 574. Lord Mansfield says, “ I take the word *barratry* to have been originally introduced

1063. Accordingly, *a mere mistake*, without dishonesty or a violation of duty, *is not barratry* :

As where the master honestly misconstrues his instructions, or commits an error as to the best mode of carrying them into effect :<sup>1</sup>

Or deviates through ignorance, without any fraudulent intent :<sup>2</sup>

Or violates a blockade through ignorance of the law.<sup>3</sup>

1064. *Barratry may be committed by persons carrying goods by land.*

Thus goods being insured "from London by land carriage to Harwich, and thence by packet to Gothenburg," were lost between London and Harwich by the fraud and negligence of the carriers. Lord Ellenborough said, "The word barratry was large enough to include every species of fraud committed by the wagoner or servants."<sup>4</sup>

1065. By our law, *any one may be insured against barratry committed by another.*

This stipulation of a policy of insurance stands on the same footing as the bond of indemnity so frequently required by the government, as well as by private corporations and individuals,

by the Italians. In the Italian dictionary, *barratare* means to *cheat*." Cowp. 154. "It is derived from *barat*, that is, *fraud, dolus*." Knight v. Cambridge, 1 Strange, 581. See also S. C. 8 Mod. 230; 2 Ld. Raym. 1349; Phyn v. Royal Exch. Ass. Co. 7 Term, 505. Chief Justice Lee said: "To make barratry, it must be something of a criminal nature, as well as a breach of contract." Stamma v. Brown, 2 Strange, 1173. See also S. C. 8 East, 136, cited by Lord Ellenborough from MS. Lord Ellenborough says, "Barratry includes every species of fraud in the relation of the master to his owners, by which the subject-matter insured might be endangered." Earle v. Rowcroft, 8 East, 126. Marshal, c. 12, s. 6, p. 515, says barratry "may be defined to be any act committed by the master or mariners, for an

unlawful or fraudulent purpose, contrary to their duty to their owners, and whereby the owners sustain an injury." Park, 7th London ed. 137, says it is "any act of the master or mariners of a criminal or fraudulent nature, or which is grossly negligent, tending to their own benefit, to the prejudice of the owners, without their consent." On the continent of Europe misconduct or negligence of the master, though without fraud, is considered to be barratry. 1 Emer. c. 12, s. 3.

<sup>1</sup> Bottomly v. Bovill, 5 Barnew. & C. 210; 7 Dowl. & R. 702.

<sup>2</sup> Phyn v. Royal Exch. Ass. Co. 7 Term, 505.

<sup>3</sup> Dederer v. Delaware Ins. Co. 2 Wash. C. C. 61.

<sup>4</sup> Boehm v. Combe, 2 Maule & S. 172.

of treasurers, cashiers, secretaries, and other officers and agents. The master or any mariner may be insured against barratry.<sup>1</sup>

1066. *A deviation or delay for the captain's private purposes, is barratry :*

As where a ship was chartered for a voyage from London to Seville, on which voyage goods were shipped and insured, and the captain, with the privity of the owner, put into Guernsey to take in brandy and wine on his own account, without the knowledge of the charterer :<sup>2</sup>

And in case of the master on a voyage to New Orleans dropping anchor in the Mississippi and going in his boat up to New Orleans to inquire about the market there for a private adventure of his own, and finding he could not dispose of it there, sailing for the Havana.<sup>3</sup>

1067. Where a loss is incurred in consequence of an intentional contravention of law on the part of the master or mariners, it comes within the risk of barratry. If the loss happens immediately by a peril insured against, in consequence of an unintentional contravention of law by the master or men, without fraud or exceeding recklessness, or very gross negligence and violation of duty, the underwriters are answerable for it as happening by such perils, if the same is insured against, though the insurance is not against barratry, provided the master and officers have such knowledge of the well-known customs and regulations relative to the conduct of the adventure as is requisite in order to render the ship seaworthy :<sup>4</sup>

1068. Trading with the public enemy is a barratrous act, even though done with the purpose of benefiting the owners :<sup>5</sup>

So is collusion by the captain with an enemy privateer, to have his ship captured :<sup>6</sup>

And fraudulently sailing for a port of the enemy :<sup>7</sup>

And resistance to search when rightfully demanded by a belligerent :<sup>8</sup>

<sup>1</sup> Stone v. National Ins. Co. 19 Pick. Mass. 34.

<sup>2</sup> Vallejo v. Wheeler, Cowp. 143 ; S. C. more fully stated, Lofft, 645, and see a statement of the case, 1 Johns. N. Y. 234, n. ; 235, n.

<sup>3</sup> Ross v. Hunter, 4 Term, 33.

<sup>4</sup> Supra, s. 2., No. 1049.

<sup>5</sup> Earle v. Rowcroft, 8 East, 126. See this case infra in this section.

<sup>6</sup> Archangelo v. Thompson, 2 Campb. 620.

<sup>7</sup> Goldsmidt v. Whitmore, 3 Taunt. 508.

<sup>8</sup> Brown v. Union Ins. Co. of New London, 6 Hall's Law Journal, 526.

And the rescue of a neutral vessel detained and sent in for examination by a belligerent; being, in effect, a resisting of the right of search: <sup>1</sup>

And wilful violation of blockade: <sup>2</sup>

Or of an embargo: <sup>3</sup>

And in case of the captain's going off the course and fraudulently selling the vessel. <sup>4</sup>

In case of a voyage from St. Petersburg to London, the ship having put into Yarmouth for repairs, the captain left there and went to visit his family in Ireland, and did not return to Yarmouth until about six weeks after the vessel had been repaired and in a state to have proceeded on her voyage. Subsequently, having concealed the vessel's papers, he sailed for the Azores with forged papers. Defence of deviation by delay, prior to the barratrous departure from the course of the voyage, being alleged, Mr. C. J. Dallas left it to the jury whether the captain had meditated, and begun the preparations for the execution of, his fraudulent project during his delay in Ireland; and they found a verdict that this delay was barratrous, which verdict was approved by the court. <sup>5</sup>

1069. *Cruising illegally and contrary to instructions is barratry.*

In case of letters of marque being taken as an inducement to seamen to ship, without any intention, or the clearance requisite by statute, to cruise, the captain was instructed to proceed to his port of destination with all expedition. After getting to sea, and with the consent of a major part of his crew, he commenced cruising, and plundered one American vessel, and took another as prize to Bermuda, where his own vessel was wrecked. This was held to be barratry. <sup>6</sup>

1070. *In case of barratrous deviation under a policy against barratry, the underwriters subsequently remain liable on the policy notwithstanding such deviation.* <sup>7</sup>

<sup>1</sup> Dederer v. Delaware Ins. Co. 2 Wash. C. C. 61. See also Wilcocks v. 138.

Union Ins. Co. 2 Binn. Penn. 574.

<sup>2</sup> Calhoun v. Ins. Co. of Pennsylvania, 1 Binn. Penn. 293; Vos v. United Ins. Co. 2 Johns. Cas. N. Y. 180.

<sup>3</sup> Robertson v. Ewer, 1 Term, 127, as

stated by Lord Ellenborough, 8 East, 138.

<sup>4</sup> Dixon v. Reid, 5 Barnw. & Ald.

597; 1 Dowl. & R. 207.

<sup>5</sup> Roseow v. Corson, 8 Taunt. 684.

<sup>6</sup> Moss v. Byrom, 6 Term, 379.

<sup>7</sup> Vallejo v. Wheeler, Cowp. 143; Lofft, 645; Park, Ins. 138.



1071. *Theft, embezzlement, and wilful destruction of the property insured, are in their nature barratrous acts ;*<sup>1</sup>

1072. *So also is an attempt to smuggle goods, either at a home port,*<sup>2</sup> *or in a foreign port.*<sup>3</sup>

1073. *Where the master deliberately commits a violation of law, whereby the parties to the adventure obviously may be prejudiced, it is barratry, though he has not his private advantage especially in view to their injury, and even though he may intend their benefit.*

During war between England and the Netherlands, an English vessel was insured for a voyage to the coast of Africa and the West Indies. The captain, being on the African coast and not finding a good market at the British settlements, proceeded to D'Elmina, a Dutch fort, where he exchanged his cargo. His object in going to D'Elmina was to purchase a cargo cheaply and expeditiously. Besides his regular pay, he was entitled to commissions on his purchases. The vessel was seized and forfeited, in consequence of this illegal act.

Lord Ellenborough said: "It has been asked, how this act of the captain in going to D'Elmina, in order to purchase his cargo more cheaply and expeditiously for his owners, is a breach of trust, as between him and them? Now I conceive the trust reposed in the captain of a vessel obliges him to obey the written instructions of his owners; and where his instructions are silent, he is at all events to do nothing but what is consonant to the laws of the land, whether with or without a view to their advantage. I cannot, for a moment, suffer it to be supposed that a captain is not guilty of a breach of trust to his owners, who does an act which is injurious to them."

It has been strongly contended, that if the conduct of the master, although criminal in respect to the state, were, in his opinion,

<sup>1</sup> *Falkner v. Ritchie*, 2 Maule & S. 290; *Marcadier v. Chesapeake Ins. Co.* 8 Cranch, 39; and see cases on barratry generally.

<sup>2</sup> *Pipon v. Cope*, 1 Campb. 434; *Vallejo v. Wheeler*, Cowp. 143.

<sup>3</sup> *Knight v. Cambridge*, 1 Strange, 581; 8 Mod. 230; 2 Ld. Raym. 1349.

The report of this case does not state what was the act of the captain, but in *Stamma v. Brown*, 2 Strange, 1173, and *Vallejo v. Wheeler*, Cowp. 143, it appears to have been an attempt to evade duties. See also *American Ins. Co. v. Dunham*, 12 Wend. N. Y. 463; 15 id. 9.

likely to advance his owner's interest, and intended by him so, it will not be barratry. But to this we cannot assent.<sup>1</sup>

1074. *A gross and palpable violation of trust by the captain, and a reckless disregard to his duty, is barratry*, though without any view to his own particular advantage to the prejudice of his principals:

As in case of the captain's sailing with an unfavorable wind, contrary to the directions of the pilot, having before refused to sail, when the wind was fair; and his disregarding the pilot's instructions in other respects, though informed of the consequences; and his conduct in cutting the cable so that the ship drifted on the rocks; Lord Ellenborough remarking that "it has been solemnly decided, that a gross malversation by the captain, in his office, is barratrous."<sup>2</sup>

"If the master, knowing the inevitable danger of capture if he proceeded on his voyage, should notwithstanding continue it, and expose the vessel to certain seizure, this will be barratry."<sup>3</sup>

"If," says Mr. Justice Johnson, "a master sees another in the act of scuttling or firing the ship, and will not rise from his berth to prevent it, he is, *primâ facie*, chargeable with barratry; although a mere nonfeasance, it is a breach of trust, a fault, an act of infidelity to his owners."<sup>4</sup>

The doctrine of the preceding cases is supported by divers others.<sup>5</sup>

Some cases have supported a doctrine different from the two last general propositions above stated:

As where the master of a neutral vessel covered belligerent property as neutral:<sup>6</sup>

And where the master was induced, by the offer of a reward, to go off the course of his voyage to rescue a ship that had been run away with.<sup>7</sup>

<sup>1</sup> Earle v. Rowcroft, 8 East, 126.

<sup>2</sup> Hayman v. Parish, 2 Campb. 149.

<sup>3</sup> Richardson v. Ma'ne Ins. Co. 6 Mass. 102, at pp. 117, 121; and see also Goldsmidt v. Whitmore, 3 Taunt. 508.

<sup>4</sup> Patapsco Ins. Co. v. Coulter, 3 Pet. 222.

<sup>5</sup> Robertson v. Ewer, 1 Term, 127; Stamma v. Brown, 2 Strange, 1173; Vallejo v. Wheeler, Cowp. 143; Moss

v. Byrom, 6 Term, 379; Brown v. Union Ins. Co. of New London, 6 Hall, Law Journ. 526; Calhoun v. Ins. Co. of Pennsylvania, 1 Binn. Penn. 293, per Brackenridge, J.

<sup>6</sup> Crousillat v. Ball, 4 Dall. Penn. 294.

<sup>7</sup> Hood's Ex'rs v. Nesbitt, 2 Dall. Penn. 137; 1 Yeates, Penn. 114.

In each of these cases the master had no special view to his own benefit to the prejudice of his owners; and on the ground, as has been remarked, of its being his "mistake," rather than "gross malversation,"<sup>1</sup> these acts were held not to be barratry. But the cases seem to be instances of such gross violation of duty, to the evident jeopardy of the interest of the owners, as to come within the above authoritatively established construction of barratry.

1075. The warranty of neutral property as lawful trade does not diminish or affect the risks assumed by the underwriters against barratry.

Under a policy on the ship *Ann*, "warranted free from any charge, damage, or loss, which may arise in consequence of seizure or detention of the property, for or on account of any illicit or prohibited trade," the master, without the knowledge of his owner, privately conveyed a quantity of gunpowder on board of the vessel on his own account, of which no mention was made in the log-book. The vessel was seized and condemned at St. Domingo, on account of having this article on board, which was there prohibited. The court said, "We have no doubt on the conduct of the master; it was certainly barratry."<sup>2</sup>

In an action on a policy upon goods warranted neutral, barratry being one of the risks insured against, Tilghman, C. J., said, that, "taking the whole instrument together, he thought it most reasonable so to construe it as to leave the insurance against barratry in full force. On this principle the warranty will imply, that as to all acts to be done by the assured themselves, or by their agents, except only such as amount to barratry, the neutral character shall be preserved."<sup>3</sup>

If the captain smuggles goods without the consent of his owners, it is barratry, though the policy is "upon all lawful trade," for, said Lord Kenyon, "the words *LAWFUL TRADE*, in the policy, mean the trade in which the ship is sent by the owners."<sup>4</sup>

1076. *If the owners are in fault in not preventing any act of the master or mariners, though they do not directly assent to it, the act is not barratry:*

<sup>1</sup> *Wiggin v. Amory*, 14 Mass. 1.

<sup>3</sup> *Wilcocks v. Union Ins. Co.* 2 Binn.

<sup>2</sup> *Suckley v. Delafield*, 2 Caines, N. Y. Penn. 574.

<sup>4</sup> *Haveloc v. Hancil*, 3 Term, 277.



As in a case in which it appeared that the mariners had three times successively subjected a vessel to the danger of seizure and forfeiture, by smuggling, though without the knowledge of the owners. The loss by these seizures being claimed, Lord Ellenborough said: "This is a clear case of *crassa negligentia* on the part of the assured. It was his duty to have prevented these repeated acts of smuggling by the crew. By his neglecting so to do, and allowing the risk to be monstrously enhanced, the underwriters are discharged." <sup>1</sup>

1077. Barratry being an act done against the owners of the ship, *the assured cannot recover for a loss by a barratrous act of the master done with the consent of the owner, or the person who is considered to be such, in respect of barratry*; for, says Lord Mansfield, "nothing is so clear as that no man can complain of an act to which he himself is a party." <sup>2</sup> In such case the act cannot be said to be done against the owner.

The captain of a ship, a Frenchman, with the concurrence of one of the owners, also a Frenchman, by means of new bills of lading, and with the design of embezzling the property, put the cargo into the hands of a person named as consignee in the new bill of lading, to whom it had not been consigned. This conduct was considered to be barratry in France, but in England it was held not to be so. Lord Mansfield said: "The point to be considered is, whether barratry can be committed against any but the owners of the ship? It is clear, beyond contradiction, that it cannot. For barratry is something contrary to the duty of the master and mariners, the very terms of which imply that it must be in the relation in which they stand to the owners of the ship. An owner cannot commit barratry; he may make himself liable by his fraudulent conduct to the owner of the goods, but not as for barratry. Barratry cannot be committed against the owner, with his consent." <sup>3</sup>

1078. *A ship being insured in behalf of the owner, the underwriters are liable under a policy in his favor, for an act of barratry committed by the master, with the privity of the freighter.* <sup>4</sup>

1079. So, vice versâ, *where a chartered ship is navigated by the*

<sup>1</sup> *Pipon v. Cope*, 1 Campb. 434.

<sup>2</sup> *Cowp.* 155.

<sup>3</sup> *Nutt v. Bourdieu*, 1 Term, 323.

<sup>4</sup> *Boutflower v. Wilmar*, 2 Selwyn, N. P. 590.



*charterer at his own risk, he having the appointment of the master, a deviation by the master, with the privity of the owner, but without the knowledge of the charterer, is barratry*<sup>1</sup> in respect of others than the owner.

1080. The circumstance of *the captain's* acting as agent of his owner, or of the shippers, in another capacity, is considered by Emerigon;<sup>2</sup> who says, that, in such case, his *acts as consignee of the cargo*, or factor, *must be distinguished from those which he does in his capacity of captain*; for it is only in this capacity that he can commit barratry.

This distinction was considered in a case decided in New York. The captain, being also consignee of the cargo insured, was supposed fraudulently to have sunk his vessel at the island of Santa Cruz. "The fraud of the master," said Mr. Justice Kent, "was not committed in his character of consignee of the cargo, but in his character of master of the vessel. He could not lay aside his character and responsibility as master, until the vessel had performed her voyage, and arrived at her port of destination."<sup>3</sup>

Under a policy on the cargo of the schooner *Despatch*, from Havana to New Orleans, and at and from thence to New York, the captain, being supercargo and sole consignee of the cargo, consisting partly of specie, on arriving at New Orleans, converted the specie to his own use, abandoned the voyage, and absconded. The assured were owners of both the vessel and cargo. It was contended, that "there could not be barratry in relation to the cargo, when it was owned by the owner of the vessel; and also, that the act of the captain ought to be referred to his character of consignee of the cargo. But the court said, "This was clearly a breach of duty in his character of master, though he had a superadded character of consignee."<sup>4</sup>

<sup>1</sup> *Vallejo v. Wheeler*, Cowp. 143; *Johns. N. Y.* 40. Mr. Justice Kent is and see *M'Intyre v. Browne*, 1 *Johns. N. Y.* 234, n.

<sup>2</sup> Emerigon, tom. 1, p. 370, c. 12, s. 3. See also *Casar. Disc.* 1, n. 75, 76.

<sup>3</sup> *Kendrick v. Delafield*, 2 *Caines, N. Y.* 67.

<sup>4</sup> *Cook v. Commercial Ins. Co.* 11

reported to have said: "It is a question, whether even barratry with the concurrence of the owners of goods will exempt the insurer of goods belonging to an innocent shipper. The English authorities do, however, look very strongly to the opinion, that the insurer would not,

1081. *The control and superintendence which the assured has of the conduct of the mariners, and is supposed to exercise through the master, and the little trust that is ordinarily and necessarily reposed in them, render the assured answerable for their conduct in a much greater degree than he is for that of the master; and accordingly, the insurers are in proportion less answerable for any breach of trust on their part, since it is the fault of the assured to repose any very great trust in them.*

With this distinction, an act of barratry in the mariners does not differ from the same act in the master, and therefore, where an act barratrous in its nature is done by the mariners, the insurers are answerable for a loss occasioned by it, if, with due precautions and diligence, it could not have been prevented.<sup>1</sup>

In respect to petty thefts and embezzlements by the mariners, the insurers are held not to be answerable for them, where, with due vigilance, they might be prevented. Losses of this description are more usually paid by withholding wages. Still, such loss may be stipulated against in the policy.

But when any crime or fraud is committed by the mariners, under such circumstances that it could not have been prevented by the prudence and vigilance of the assured, or his representative, the master, the insurers are liable for the loss under barratry simply:

As where the crew compelled the master to change his course to bring in a prize;<sup>2</sup> and in another case to return to the port of departure, from an apprehension of corsairs;<sup>3</sup> it was held that the insurers were answerable. Sir R. P. Arden, Master of the Rolls, remarks that this was a case of barratry in the mariners,<sup>4</sup>

in such a case, be responsible." *Kendrick v. Delafield*, 2 Caines, N. Y. 73. I do not know of any English authorities to this effect, nor is the position supported by the passages in Millar, 165, 167, and Marshall, 452, referred to by the judge, which makes it not improbable that there is a mistake in the report, and that it ought to be, "with the concurrence of the owners of the ship."

<sup>1</sup> *Pipon v. Cope*, 1 Campb. 434; *American Ins. Co. v. Bryan*, 26 Wend.

N. Y. 563; *King v. Shepard*, 3 Stor. C. C. 349.

<sup>2</sup> *Elton v. Brogden*, 2 Strange, 1264. See 4 Bos. & P. 186, and *Park, Ins.* 142, n.; *Marshall, Ins.* 521, 3d ed.; *Vallejo v. Wheeler*, Cowp. 143; and *Scott v. Thompson*, 4 Bos. & P. 181; for remarks upon *Elton v. Brogden*, as to its being a case of barratry.

<sup>3</sup> *Driscoll v. Passmore*, 1 Bos. & P. 200.

<sup>4</sup> *De Frise v. Stephens*, *Marshall, Ins.* 2d ed. 521, n.

as it plainly was, and he thinks that the reported dictum of Lee, C. J., to the contrary,<sup>1</sup> must be an error of the reporter.

Where four of the mariners conspired with some prisoners of war on board, and overpowered the master and the rest of the crew, and ran the ship ashore, it was held to be a loss by barratry.<sup>2</sup>

1082. *Barratry* being an act prejudicial to the owners, and done without their consent, it is plain that it *cannot be committed by a master who is owner or part-owner of the vessel*.<sup>3</sup>

If there is any question whether he is owner, it belongs to the insurers to show that he is so. It is sufficient for the assured to make out the barratrous act, and the underwriters must show any thing that discharges them from their agreement of indemnity.<sup>4</sup>

Where the master was general owner of the ship which he had bottomried and mortgaged, but of which he had the control and navigation, Lord Hardwicke held that he could not commit barratry, so as to give the assured on goods a claim against his underwriters under this risk.<sup>5</sup>

1083. The rule as to ownership in respect to barratry, as laid down by Mr. Justice Story, is, that "*a person may be owner for the voyage who hires the ship for the voyage, and has the exclusive possession, command, and navigation of the ship*." <sup>6</sup>

Accordingly, the case then under consideration was held not to be one of barratry, because the master of the vessel chartered, who was himself the owner, retained "the exclusive possession, command, and management of her, and she was navigated at his expense."

Lord Mansfield says: "It is material whether the owner of the goods has the direction. If the ship be let, as a house, then the freighter is owner, but if it be only a covenant that the ship shall go only that voyage for the freighter, then he has only the use of the vessel."<sup>7</sup>

<sup>1</sup> Elton v. Brogden, 2 Strange, 1264. M'Intyre v. Browne, 1 Johns. N. Y.

<sup>2</sup> Toulmin v. Anderson, 1 Taunt. 229.

<sup>3</sup> Marcardier v. Chesapeake Ins. Co. 8 Cranch, 39; Wilson v. General Ins. Co. 12 Cush. Mass. 360.

<sup>4</sup> Ross v. Hunter, 4 Term, 33; Steinback v. Ogden, 3 Caines, N. Y. 1;

<sup>5</sup> Lewen v. Suasso, Postleth. Dict. art. Assurance.

<sup>6</sup> Marcardier v. Chesapeake Ins. Co. 8 Cranch, 39. See also Hooe v. Groverman, 1 Cranch, 214.

<sup>7</sup> Vallejo v. Wheeler, Cowp. 143; Lofft, 645.



The doctrine thus laid down is broader than that of Mr. Justice Story, as it applies to the charter of the whole ship for a voyage or period, during which the charterer has the use and control of the ship. In the case then before the court, the charterer hired the ship for a voyage from London to Seville and back, and put it up as a general ship, and the assured and others shipped goods for the voyage. It was held that the charterer, and not the owner, was to be considered to be owner, in respect to barratry.<sup>1</sup>

Where the master had given his promissory note for the amount of the purchase-money of a vessel, which was indorsed by another person, to whom the bill of sale was made out, and in whose name the vessel was registered as collateral security, it was held that the master could not commit barratry;<sup>2</sup> that is to say, he was to be considered as an owner.

So it was held that, in a similar case, the owner could not recover from his underwriters against barratry, indemnity for a loss by a barratrous act of the master assented to by the charterer. Hobbs, the owner of a ship, chartered her to Woodman, who agreed to pay a certain sum to the owner if she should be lost. Woodman was to have the absolute control of the ship. He consigned her to Kendal, at Rio Janeiro, "whose orders he desired the captain implicitly to obey." Kendal being at Buenos Ayres at the time of the ship's arrival at Rio, his partner at the latter place ordered the captain to proceed to Buenos Ayres, who accordingly proceeded thither, where Kendal sent smuggled goods on board, in consequence of which the ship was seized and condemned. Lord Ellenborough: "I clearly think the loss is to be imputed to the plaintiff himself. If I give the dominion of my ship to a charterer, his acts are my acts; and in this case Kendal, whose orders the master implicitly obeyed, according to his instructions, was, in point of law, the agent of the assured. Therefore the loss arose from his own orders, and there is no pretence for imputing it to barratry."<sup>3</sup> It does not appear at whose expense the ship was navigated in this case.

In a case decided in New York, M'Intyre, the assured, and

<sup>1</sup> Vallejo v. Wheeler, Cowp. 143; Lofft, 645.

<sup>3</sup> Hobbs v. Hannam, 3 Campb. 93.

The same doctrine is adopted in Soares v. Thornton, 1 J. B. Moore, 373.  
<sup>2</sup> Barry v. Louisiana Ins. Co. 11 Mart. n. s. La. 630.



owner of a vessel, let her to freight to Aiken and Brice, for a voyage from New York to Trinidad and back, with liberty to touch at Curaçoa, "excepting one half of the cabin, the privilege for twenty barrels for the master and mate, and so much of the hold and forecabin as was necessary for the accommodation of the master and crew, provisions," &c. M'Intyre effected insurance on the vessel for the same voyage. Brice acted as supercargo. While the vessel was proceeding on her return from Trinidad towards Curaçoa, the master, at the request of Brice, and on being promised one hundred dollars with indemnity to himself and his owners, changed his course and went to a port on the Spanish Main. A loss afterwards occurred, which was claimed by M'Intyre under the risk of barratry, and the decision was in his favor."<sup>1</sup>

In a case under a policy upon goods, a loss was claimed for barratry of the master, who hired the ship at a certain sum per month, the owners to keep her in repair, the master to victual and man her. The master embezzled the cargo. The court said: "The master was to be considered owner for the voyage."<sup>2</sup>

So, where it was verbally agreed that the master should have the use and control of a vessel from November to May, and victual and man her at his own expense, the owners to be at the expense of repairs, the master to pay over one half of her earnings, it was held that this agreement made the master owner as to barratry, and accordingly, that "the offence of barratry could not be committed by him."<sup>3</sup>

The assured effected a policy on the freight assigned to them by the owner of the vessel, as security for advances, intending, and in the legal proceedings alleging the insurance to be made

<sup>1</sup> M'Intyre v. Browne, 1 Johns. N. Y. 229.

<sup>2</sup> Hallet v. Columbian Ins. Co. 8 Johns. N. Y. 272. And a charterer having the absolute control is the person answerable to the shipper of goods, and not the general owner. James v. Jones, 3 Esp. 27. And on the question as to the owner or charterer being answerable to the shipper, see Saville v. Campion, 2 Barnw. & Ald. 503; Campion

v. Colvin, 3 Bingham. N. C. 17; Christie v. Lewis, 2 Brod. & B. 410; Tate v. Meek, 8 Taunt. 280; Yates v. Railston, id. 293; Yates v. Maynell, id. 302; Newberry v. Colvin, 7 Bingham. 190; and for an opposite decision to that in the preceding cases, Hutton v. Bragg, 7 Taunt. 14. See also, on the same question, Parish v. Crawford, reported Abbott, Shipp. 5th ed. 19.

<sup>3</sup> Taggard v. Loring, 16 Mass. 336.

for their own benefit to the amount of the balance due to them, surplus for the benefit of the owner of the ship; with the clause excepting barratry if the assured were owners. It was held by the Supreme Court of Louisiana, that, as the assured were assignees of the owner, and insured in part at least for his benefit, the policy was subject to the exception of barratry.<sup>1</sup>

1084. *It has been thought singular that insurers, who have not the appointment or control of the captain, and who often do not know him, should stipulate to make indemnity for his frauds and misconduct to the assured, whose agent he is, and who in case of insurance on the ship, may dismiss him when they please.*<sup>2</sup> "It is strange," says Lord Mansfield, "that barratry should have ever crept into insurance."<sup>3</sup> But what is there strange in the merchant's wishing to secure himself against the risk of the dishonesty of the master? for though he secures himself as well as he possibly can against all risks of trade, except that of the markets, still there are many left for him to run, and it is natural that he should wish to diminish the number, as his whole fortune is often at hazard. Nor does it seem remarkable that insurers should be willing to take this risk, provided they receive an adequate premium. Courts have often said they would not extend the construction of barratry, that is, that they will give the contract a narrower construction than they might perhaps do, if they thought it expedient, and on the whole advisable and useful, to comprehend this among the risks ordinarily insured against. It seems to be questionable whether this consideration ought to have much influence in limiting the construction of a contract. The parties themselves generally have better means of forming an opinion respecting considerations of this description, and their interest makes them sufficiently vigilant and active in availing themselves of the means they possess to judge of the expediency of subscribing to stipulations, of the practical operation of which they cannot be ignorant.

The reasons urged to show the inexpediency of insuring against the barratry of the master, apply with very little force to policies on goods where the assured is not owner of the ship, since the

<sup>1</sup> *Paradise v. Sun Mut. Ins. Co.* 6 La. Ann. 596.

<sup>2</sup> 8 East, 134; 8 Johns. N. Y. 213;

<sup>2</sup> Johns. Cas. N. Y. 188.

<sup>3</sup> 1 Term, 330.

master is often, and probably in the greater number of instances, as well known to the insurers as to the assured; and though he is to some purposes the agent of the assured on goods, yet they have no more direct control of his conduct than the underwriters have. Accordingly, some underwriters make a distinction between policies on the ship, and those on the cargo, and insure against barratry only in the latter, and not in these, if the assured is owner of the ship as well as the goods.

1085. *There seems to be no reason against extending indemnity to the shipper against the frauds of the ship-owner; though it requires an express provision for this purpose.*

#### SECTION IV. THE INSURERS ARE NOT LIABLE FOR ORDINARY PERILS AND LOSSES.

1086. Whatever risks are assumed by *the underwriter*, his liability is subject to two limitations; *he is not liable for the consequences of the perils assumed, except when they operate in an extraordinary degree, and he is liable only for loss and damage of an extraordinary kind.*

Mr. Justice Thompson says: "The insurer undertakes only to indemnify against the extraordinary and unforeseen perils of the sea, not against the ordinary perils to which every ship must be exposed in the usual course of the voyage."<sup>1</sup>

Mr. Justice Washington, instructing the jury respecting a claim for a loss on a vessel insured from Brazil to China, said: "If the loss arose from the ordinary circumstances of such a voyage as this was, as from sea-damage, or wear and tear, which, without any action of an extraordinary cause, was to be expected, the insurer is not liable."<sup>2</sup>

The peril of capture is not subject to degrees, but is always considered to be extraordinary, and in all cases gives the assured the right of abandoning and claiming for a total loss. But other perils of the seas may be ordinary or extraordinary, and so may their effects; and unless the degree of a peril and its effects are

<sup>1</sup> *Barnewall v. Church*, 1 Caines, N. Y. 217, 234.

<sup>2</sup> *Coles v. Marine Ins. Co.* 3 Wash. C. C. 159.

both extraordinary, the assured has no claim for indemnity. But the effect may itself show that the cause must have been extraordinary.<sup>1</sup>

1087. *Though the operation of a peril insured against is extraordinary, if its consequences are not so, it is not a loss within the policy.*

Stranding is usually an extraordinary incident, yet if its consequences are not extraordinary, the assured has no claim against the underwriters. In a case of a ship's being strained, and accordingly weakened, and injured, in consequence of stranding, Mr. Justice Baldwin said: "Invisible, uncertain, and conjectural damages are never the subject of remuneration. I apprehend the injury is not the subject of adjustment, unless it be capable of repair in the ordinary course of business."<sup>2</sup>

And so it was held by the Supreme Court of Massachusetts, that underwriters are not answerable for indefinite straining and deterioration, which cannot be repaired and of which no specific estimate or evidence can be given.<sup>3</sup>

A vessel insured on time in the British coasting trade, while lying with its cargo on board in Sunderland harbor, moored in the usual place and manner, being injured and hogged by taking the bottom at low tide, when there was nothing extraordinary in the state of the weather and the water, Jervis, C. J., Maule, J., and Creswell, J., of the English Common Pleas, held that the underwriters were not liable.<sup>4</sup> This case may, however, be doubted, since, if the ship was seaworthy, there must have been something extraordinary and out of the common course in the manner of taking the ground.

Underwriters upon whiskey on board of a flatboat in the Mississippi, properly constructed and manned for such a navigation, were held liable for damage to the whiskey caused by a wave raised by a large steamboat passing near to the flatboat just at

<sup>1</sup> Insurance on slaves against drowning is held to cover drowning from ordinary as well as extraordinary causes. *Moore v. Perpetual Ins. Co.* 16 Mo. 98.

<sup>2</sup> *Sage v. Middletown Ins. Co.* 1 Conn. 239.

<sup>3</sup> *Orrock v. Commonwealth Ins. Co.* 21 Pick. Mass. 456; *Crofts v. Marshall*, 7 Carr. & P. 597.

<sup>4</sup> *Magnus v. Buttemar*, 11 C. B. 876; 9 Eng. L. & Eq. 461. See also *Fritchette v. State Ins. Co.* 3 Bosw. N. Y. 190.



the border of deep and shoal water, and were not exonerated on the ground of the occurrence being an ordinary one.<sup>1</sup>

What is to be considered ordinary, and what extraordinary, in the degree and effects of the perils, is a question for the jury often of much difficulty. It is sufficient for the present to have stated the doctrine generally; the illustrations of it, and its application to particular cases, will appear more fully under the heads of the perils of the seas and the other divers perils and losses insured against.<sup>2</sup>

1088. *The underwriters are not liable to make indemnity for the mere deterioration of the subject by age or wear and tear, where no extraordinary peril intervenes.*

#### SECTION V. DAMAGE ARISING FROM THE QUALITIES OF THE SUBJECT.

1089. From the enumeration already given of the perils usually insured against, it appears that the *insurers undertake to make indemnity only for damage arising from external accidents, not for that occasioned by the qualities or defects of the thing insured.* Policies contain a provision that the insurers shall not be liable for any loss upon certain enumerated articles, unless it amounts to a certain rate per cent. The articles to which this provision relates are those most subject to damage and decay from their internal qualities. But independently of this provision, it is a general rule that the insurers are not, under the common form of the policy, liable for any damage or loss arising from the qualities or defects of the subject insured, since these are not among the perils assumed by the underwriter.<sup>3</sup>

Hemp was insured from London to the coast of Devonshire. While the vessel lay near Torbay, a fire broke out in the hold during the night, by which the greater part of the hemp was consumed. The origin of the fire could not be discovered. Lord Ellenborough said: "If the hemp was put on board in a state liable to effervesce, and did effervesce and generate the fire, the

1 Washington Ins. Co. v. Reed, 20 Ohio, 199. See also Van Valkenburg v. Astor Ins. Co. 1 Bosw. N. Y. 61.

2 See No. 1088, 1101, 1105, 1296, 1297, 1298, 1299.

3 Pothier, Ins. n. 66.

assured cannot recover for the loss." There being no proof that the fire so originated the verdict was for the assured.<sup>1</sup>

1090. *The underwriters are not liable for the waste occasioned by ordinary leakage*, since it arises from the qualities of the article. But what is ordinary and what is extraordinary leakage depends upon the nature of the article, and the length of the voyage.<sup>2</sup> Some insurance companies publish rules on this subject.<sup>3</sup>

It appears from what has been before said, that the mere fact that the damage from leaking or breakage is more than ordinary, does not necessarily give the assured a valid claim against the underwriters, since it must appear, either from the kind and degree of damage or otherwise, that it has been occasioned by some extraordinary accident.

Mr. Stevens<sup>4</sup> says: "According to the custom at Lloyd's, articles subject to leakage are free from average, unless it can be shown that the ship has struck the ground with such force, as to make it probable that she has thereby deranged her stowage."

1091. *The rule at Lloyd's is the same with regard to earthen ware and things liable to breakage.*<sup>5</sup>

The force of the custom at Lloyd's, in respect to such articles,

<sup>1</sup> Boyd v. Dubois, 3 Campb. 133.

<sup>2</sup> 2 Valin, 83, tit. Ins. a. 31.

<sup>3</sup> The rules of the Patapasco Insurance Company, in Baltimore, published in 1814, provide that, "in cases of partial loss on liquids, ten per cent. ordinary leakage shall always be deducted." Most of the forms of policies in use in Boston contain no exception relating to liquids, nor is there any specific rule in the practice at that port, except, by some companies, as to molasses. The method is to ascertain, in respect to a voyage, what leakage is to be attributed to ordinary causes, or to the fault of the assured or his agents. In doing this, the season of the year; the kind of article; the description of vessel in which it is contained; the length of the particular passage; the situation of the cargo on arrival; in respect of stowage;

are all taken into consideration. In some articles brought from warm climates a considerable deficiency is occasioned by the mere difference of temperature. In such cases an allowance of a certain per cent. is made for "shrinkage." The usual method is to compare the leakage in the particular case with the leakage on the same article in other vessels, which have performed the voyage at about the same time. It is said that there is not found to be any great difficulty in this mode of adjusting losses upon such articles. A form of policy of the Lexington Insurance Company expressly exonerated the insurers from all loss by leakage. Policies do not, as I understand, usually contain any provision on this subject.

<sup>4</sup> Stevens, Av. part 3, art. 1.

<sup>5</sup> Ibid.

is accordingly equivalent, or rather it is more than equivalent, to the memorandum in the policy, whereby the insurers are exempted from particular average on certain articles, unless the ship be stranded. But this rule does not appear to be adopted generally in the United States.

1092. Upon the principle that the underwriters are not answerable for damage arising from the qualities of the thing insured, a loss of slaves who died from despair on account of the failure of a mutiny or otherwise, has been considered not to be by the perils insured against.<sup>1</sup>

In the case of an insurance of animals against the usual perils, the insurers are not answerable for loss by disease and natural death.<sup>2</sup>

#### SECTION VI. EVENTS WHICH ENHANCE THE RISK.

1093. It is another general rule, which applies to all the risks assumed by the underwriters, that they continue liable for losses by the perils insured against, although those perils are greatly enhanced by events which the assured could not prevent, that take place subsequently to the date of the policy. *If the ship is delayed upon the voyage, without any fault of the assured or his agents, and not by any cause which makes the delay a deviation, the insurers are still liable*, though the delay may subject the underwriter to a winter risk, instead of a summer risk, for which only he would have been liable, had there been no delay of the voyage.<sup>3</sup>

If capture is one of the risks insured against, and after the policy is made, the risk of capture is greatly increased by the breaking out of a war, still the underwriter is liable. The risk of a declaration of war is one of those which he assumes.<sup>4</sup>

<sup>1</sup> Pothier, n. 66; 2 Valin, 55, tit. Insurance, a. 11; Tatham v. Hodgson, 6 Term, 656. Emerigon never introduces this subject of the insurance of slaves without reprobation of the practice of treating a being possessed of moral perceptions, human affections, and a mind and soul, as a piece of merchandise.

<sup>2</sup> 1 Emerigon, 393, c. 12, s. 9. See

Beaumont, F. & L. Ins. p. 15 et seq., cited Angell, F. & L. Ins. sect. 119, for illustrations of loss by the qualities of the subject.

<sup>3</sup> Vallance v. Dewar, 1 Campb. 503; and see supra, No. 218.

<sup>4</sup> Planché v. Fletcher, Dougl. 238; Saltus v. United Ins. Co. 15 Johns. N. Y. 523.

## SECTION VII. LOSS BY FIRE.

1094. *Fire is specifically insured against in the common form of marine policies. This loss, like one by capture, is in its kind extraordinary. Unless a loss happens from the qualities or defects of the subject insured,<sup>1</sup> the fault of the assured, or by some peril for which he is answerable, he is entitled to indemnity :*

*As in case of a vessel burnt by the municipal authorities from fear of its being infected and causing a pestilence :<sup>2</sup>*

*And of a subject burnt by lightning :<sup>3</sup>*

*And of a vessel taking fire in an engagement :<sup>4</sup>*

*Or burnt by accident in a dry dock :<sup>5</sup>*

*Or in case of a steamboat being burnt.<sup>6</sup>*

1095. *It was formerly made a question, whether the master and mariners are justified in setting fire to the property to prevent its falling into the hands of an enemy ?<sup>7</sup>*

Valin is of opinion that the insurers are liable for the loss in such case, if there was no other way of preventing the property from falling into the hands of the enemy, or of pirates ; and he cites the decisions of three several courts in France in support of his opinion.<sup>8</sup>

Weskett thinks that the insurers are not liable for a loss of this description, except in a case where the lives of the master and crew would be in danger were they to fall into the hands of the enemy or pirates by whom they are pursued, and the ship is burnt for the purpose of facilitating their escape. The reason he gives is, that the property might be recaptured, and the loss be diminished by the amount of salvage.<sup>9</sup> But this reason does not show that the insurers ought to be wholly exempted from the loss ; it only goes to show, at most, that what would be the net amount of the salvage in case of recapture ought to be deducted from the

<sup>1</sup> *Boyd v. Dubois*, 3 Campb. 133.

<sup>6</sup> *Pattison v. Mills*, 1 Dow & C.

<sup>2</sup> *Targa*, c. 56 ; *Casar. Disc.* 121, n. 12 ; *Emerigon*, tom. 1, p. 434, c. 12, s. 17.

*Hou. L.* 342 ; 2 *Bligh*, *Hou. L. N. s.* 519.

<sup>3</sup> *Pothier, Ins.* n. 53.

<sup>7</sup> *Loccenius de Jur. Mar.* l. 3, c. 9 ; *Kuricke, Quæs.* 29.

<sup>4</sup> *Ibid.*

<sup>8</sup> 2 *Valin*, 75, tit. *Insurance*, a. 26.

<sup>5</sup> *Per Putnam, J., in Ellery v. New England Mar. Ins. Co.* 8 Pick. Mass. 14.

<sup>9</sup> *Weskett*, tit. *Fire*, n. 6.



amount of a total loss, or else, that the insurers ought to be answerable only for the amount to which the recaptors would be entitled for recovering the property, supposing the loss, in such case, to be adjusted as an average.

Lord Ellenborough was of the same opinion with Valin. Under a policy on the commissions and privileges of the captain on a voyage from Bristol to the coast of Africa, and thence to the West Indies, the vessel being chased by a French privateer of greatly superior strength, after an unsuccessful attempt to escape, was burnt by the captain and crew to prevent her falling into the hands of the enemy. Lord Ellenborough said in reciting: "The case is new, but I am clearly of opinion that the assured is entitled to recover. Fire is expressly mentioned in the policy as one of the perils against which the underwriters undertake to indemnify the assured, and if the ship is destroyed by fire, it is of no consequence whether this is occasioned by a common accident, or by lightning, or by an act done in duty to the state."<sup>1</sup>

1095 a. The damage usually incidental to the ordinary processes in using fire, comes within the implied exception of ordinary risks and perils, and is not covered.<sup>2</sup>

1095 b. *Whether underwriters against fire on land as well as those against perils of the seas, are exonerated from loss by the qualities of the subject?*

Mr. Beaumont<sup>3</sup> is of opinion that underwriters are not liable for the loss of the thing which is consumed by reason of its own qualities, by spontaneous combustion, for instance, without any external cause, but are liable for the consequent loss of other subjects covered by the policy, which he illustrates speculatively by supposed cases.

This subject has already been considered in respect to marine perils,<sup>4</sup> and it does not appear that the risk of fire on land is on a materially different footing. Most subjects are more or less liable to damage and destruction by fire, air, or water, according to their qualities. The question in this case, as in others, is, whether the circumstances are ordinary or extraordinary, and whether the loss is directly occasioned by fire.<sup>5</sup>

<sup>1</sup> *Gordon v. Rimmington*, 1 Campb. et seq., cited Angell, F. & L. Ins. s. 123; and see note by the reporter. 119.

<sup>2</sup> *Supra*, No. 1086, 1087.

<sup>4</sup> *Supra*, No. 1089 et seq.

<sup>3</sup> Beaumont, *Fire and Life Ins.* p. 15

<sup>5</sup> See *infra*, s. 14, of this chapter.

1095 c. *Whether underwriters are liable for loss by fire consequent upon the gross negligence of the assured himself?*

Underwriters against any risk are doubtless not liable for loss purposely incurred by the assured.<sup>1</sup> The law does not, however, require of every assured the very highest degree of vigilance and diligence to preserve the insured subject from damage by fire; but he is not entitled to indemnity for negligence closely bordering upon fraud. The Supreme Court of Massachusetts are of opinion that the underwriters are, at least, not liable for loss by fire occasioned by his extreme, reckless, and inexcusable negligence, the consequences of which must have been palpably obvious to him.<sup>2</sup>

1096. *Underwriters are liable for a loss by fire under a policy against that risk only, or against that and other risks, whether on land or at sea, though occasioned by the negligence or mismanagement of the captain or mariners at sea, not of a barratrous character, when barratry is not covered, or of servants or persons properly employed by the assured in buildings.*<sup>3</sup>

Formerly the doctrine on this subject was wavering;<sup>4</sup> it is now settled.<sup>5</sup>

A provision excepting loss by design of the assured has been considered as more decidedly fixing the liability of the insurers for losses by fire set by incendiaries.<sup>6</sup>

1097. *Whether the underwriters are liable for loss by fire, where the loss is occasioned or the subject is destroyed thereby without its being actually burnt?*

<sup>1</sup> See *supra*, No. 1064.

<sup>2</sup> *Chandler v. Worcester Mut. Fire Ins. Co.* 3 Cush. Mass. 328; *Angell, F. & L. Ins.* s. 129 et seq. Want of ordinary care is said to be no defence. *Huckins v. People's Ins. Co.* 31 N. H. 238; *Hynds v. Schenectady Ins. Co.* 16 Barb. N. Y. 119.

<sup>3</sup> See *supra*, s. 2, No. 1049.

<sup>4</sup> See *Emerigon*, tom. 1, p. 433, c. 12, s. 17; *Waters v. Merchants' Louisville Ins. Co.* 11 Pet. 213; and *Grim v. Phœnix Ins. Co.* 13 Johns. N. Y. 451; *supra*, No. 1048.

<sup>5</sup> 3 Kent, Comm. 300, n., and 304; *Busk v. Royal Exch. Ass. Co.* 2 Barnew.

& Ald. 73; *Shaw v. Roberts*, Nev. & P. 279; 6 Ad. & E. 75; *Austin v. Drew*, 4 Campb. 360; *Holt*, 126; 6 Taunt. 436; 2 Marsh. 130; *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222; *Columbian Ins. Co. v. Lawrence*, 10 id. 507; *Waters v. Merchants' Louisville Ins. Co.* 11 id. 213; *Gates v. Madison County Mut. Ins. Co.* 5 N. Y. 469; *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713. See *supra*, No. 733, 1049; *Lodwicks v. Kennedy*, 5 Ohio, 436; *Per Curtis, J., General Mut. Ins. Co. v. Sherwood*, 14 How. 352, 365.

<sup>6</sup> *Catlin v. Springfield Ins. Co.* 1 Sumn. C. C. 434.

In case of a policy upon the stock of a sugar-house, Gibbs, C. J., ruled, and the ruling was supported by the court, that damage to the stock by the heat of the usual fires, in consequence of the mismanagement of the dampers by those having charge of the sugar-house, was not within the policy against fire. A jurymen remarked to the court: "If my servant, by negligence, sets my house afire, and it is burnt down, I expect, my Lord, to be paid by the insurance office." Gibbs, C. J.: "So you would, sir, but then there would be a fire, whereas here has been none. If there is a fire, it is no answer that it was occasioned by negligence or misconduct of servants; but in this case there was no fire, except in the stove and flue where there ought to have been, and the loss was occasioned by the confinement of the heat."<sup>1</sup>

So damage to sugar and molasses by merely the explosion of a steam-boiler in a sugar-house is held in Louisiana not to be covered under a policy on those articles against fire.<sup>2</sup>

In a New York case, the underwriters on a building against loss "by or by reason, or by means of fire," also "liable for fire by lightning," were held not to be liable for the loss of the building by its being demolished and shattered to pieces by lightning without the ignition of any part of it.<sup>3</sup> The decision in this case necessarily turned upon the meaning of the term "fire," and Mr. Justice Jones, in his very able statement of the grounds of the judgment, puts it upon the distinction, in the policy itself and in common usage and in scientific treatises, of fire from lightning, which latter, although like a match it may kindle a fire, yet cannot be understood to be of itself fire.

A similar judgment has been given by Parker, C. J., and his associates in New Hampshire, on an insurance upon a dwelling-house and its contents, against "loss by fire, whether by accident, lightning, or any other means, payable in three months after said property should be burnt, destroyed, or demolished by or by reason or means of fire." Some glass and crockery were broken, and some tin ware damaged by lightning, and some wood work of the house near the window through which the lightning

<sup>1</sup> *Austin v. Drewe*, 4 Campb. 360; <sup>2</sup> *Millaudon v. New Orleans Ins. Co.* Holt, 126; 6 Taunt. 436; 2 Marsh. 4 La. Ann. 15.  
130.

<sup>3</sup> *Babcock v. Montgomery County Mut. Ins. Co.* 6 Barb. N. Y. 637.

entered, as if exposed to a flame, but it did not appear from the evidence as stated, that there had been actual ignition. Parker, C. J.: "If the damage was by lightning without combustion it is clearly not within the terms of the insurance." A new trial was ordered to settle the facts.<sup>1</sup>

It has been held in New York, and in Missouri, that the underwriters are liable for the loss of a building by its being blown up with gunpowder and demolished to stop a conflagration where it would have been soon inevitably burnt, in the progress of the fire from a neighboring building already in flames.<sup>2</sup>

The doctrine of these cases seems to be, that *damage by water being thrown upon goods in extinguishing a fire, and loss by plunder of goods removed away from a fire, and so put out of the control of the assured, are, in common practice, treated as directly incidental or consequent to the fire, and covered by a fire policy.*<sup>3</sup>

In an analogous case, underwriters against fire have been held liable for the loss of a subject voluntarily burnt under circumstances in which it was on the point of instant inevitable destruction by a peril insured against. As in the case before Lord Ellenborough,<sup>4</sup> of a vessel burnt by the master and crew, to prevent its falling into the hands of the enemy. Such a construction is supported by the grave authority of Chancellor Kent, who, speaking of fear of a peril, says, "If the danger be so great as to amount almost to a certainty of capture, it becomes a restraint in contemplation of the policy."<sup>5</sup> The maxim, *Causa proxima spectatur*, affords no help in these cases, but is in fact fallacious, for if two causes conspire, and one must be chosen, the more scientific inquiry seems to be, whether one is not the efficient cause, and the other merely instrumental, or merely incidental, and not which is nearest in place or time to the consummation of the catastrophe.<sup>6</sup>

1098. *Whether underwriters against fire are responsible for*

<sup>1</sup> Kenniston v. Merrimack County Mut. Ins. Co. 14 N. H. 341. Loss by explosion and combustion of gunpowder is covered. Scripture v. Lowell Ins. Co. 10 Cush. Mass. 356.

<sup>2</sup> City Ins. Co. v. Corlies, 21 Wend. N. Y. 367; Phillips v. Protection Ins. Co. 14 Mo. 220.

<sup>3</sup> See infra, No. 1098, a.

<sup>4</sup> Gordon v. Rimmington, 1 Campb. 123.

<sup>5</sup> 3 Kent. Comm. 3d ed. 293.

<sup>6</sup> See infra, No. 1131.



*expenses successfully incurred to save the insured property from being destroyed by fire?*

Mr. Dowdeswell says this is not settled.<sup>1</sup>

In a Pennsylvania case, where insured goods were removed "under a reasonable apprehension that they would be reached by the flames," from the fourth tenement on one side in the same block, in the great fire in Pittsburgh in 1845, it was the opinion of the Supreme Court of that State, that the underwriters were not liable for the damage to the goods, and the expense of removing them.<sup>2</sup>

They have been held, in Illinois, to be liable in such a case.<sup>3</sup> And this is clearly the more equitable construction, and it comes within the doctrine of the liability of underwriters for contribution for jettison on marine insurance. So a loss by illicit trade is held to cover expense incurred to avoid seizure therefor.<sup>4</sup> The liability of the underwriters, in these and similar cases, may depend, in some degree, upon the imminency of the peril, and the reasonableness and expediency of the measures taken; and the amount of the loss may be aggravated by the fact, that the subject is, by the direct effect of the peril, put out of the control and protection of the assured and his agents.

The expense and damage incurred in such case for the benefit evidently of the underwriters, may amount to a greater part of the value of the subject. It seems, therefore, to be the better doctrine, and the one most closely analogous to the jurisprudence on the subject of insurance generally, that,

*The underwriters are liable for such damage and expense reasonably and expediently incurred, as being directly occasioned by the peril insured against.*

1098 a. *The underwriters are liable for damage to the subject and expense directly incidental or consequent to the fire: as damage to the insured goods by water thrown on to extinguish the*

<sup>1</sup> Dowdeswell, Life and Fire Ins. 109, citing Tindall v. Bell, 11 Mees. & W. Exch. 228.

<sup>2</sup> Hillier v. Alleghany Ins. Co. 3 Penn. 470.

<sup>3</sup> Case v. Hartford F. Ins. Co. 13 Ill. 676. The policy required of the assured all possible diligence to save the

goods. This does not, however, seem to make the liability of the underwriters greater than under a policy having no such clause. So held in Cincinnati. Firemen's Ins. Co. v. May, 20 Ohio, 211.

<sup>4</sup> Higginson v. Pomeroy, 11 Mass. 104.

fire, and the expense of removing the insured property from the fire. This liability has been juridically recognized.<sup>1</sup>

So they are liable for *loss by plunder*, where a removal of insured goods out of the control of the assured is directly incidental or consequent to a peril insured against: as in case of capture,<sup>2</sup> or fire.<sup>3</sup>

1098 b. It has been held in Michigan, where the policy allowed the underwriters to rebuild, that the underwriters were liable for the loss, less the value of the materials left, though this was more than the expense of rebuilding. A city ordinance forbidding such rebuilding,<sup>4</sup> and a prohibition against rebuilding by the public authorities after the loss, is no defence.<sup>5</sup>

#### SECTION VIII. PERILS OF THE SEAS.

1099. PERILS OF THE SEAS, *which constitute a part of the risks in almost every marine policy, comprehend those of the winds, waves, lightning, rocks, shoals, collision, and, in general, all causes of loss and damage to the property insured, arising from the elements, and inevitable accidents, though sometimes considered not to include capture and detention.*<sup>6</sup>

A policy against these perils accordingly covers damage:

By being fired into through mistake in being taken for an enemy:<sup>7</sup>

<sup>1</sup> Per Grier, J., *Hillier v. Alleghany Mut. Ins. Co.* 3 Penn. 470; *Whitehurst v. Fayetteville Ins. Co.* 6 Jones, No. C. 352. \*

<sup>2</sup> *Magoun v. New England Mar. Ins. Co.* 1 Stor. C. C. 157.

<sup>3</sup> *Case v. Hartford F. Ins. Co.* 13 Ill. 676; *Webb v. Protection Ins. Co.* 14 Mo. 3, where the underwriters were held to be exonerated under the exception of theft, which was impliedly recognizing their liability without this exception; *Independent Ins. Co. v. Agnew*, 34 Penn. St. 96; *Tilton v. Hamilton F. Ins. Co.* 1 Bosw. N. Y. 367; *Newmark v. Liverpool Ins. Co.* 30

Mo. 160; *Witherell v. Maine Ins. Co.* 49 Me. 200.

<sup>4</sup> *Brady v. North Western Ins. Co.* 11 Mich. 425.

<sup>5</sup> *Brown v. Royal Ins. Co.* 1 Ell. & E. 853.

<sup>6</sup> *Marshall, Ins.* 487. Mr. Justice Story considers "*dangers of the seas*," in the bill of lading, to be equivalent to "*perils of the seas*," in a policy of insurance. *The Schooner Reeside*, 2 Sumn. C. C. 567.

<sup>7</sup> *Cullen v. Butler*, 1 Stark. 138; 5 Maule & S. 461; *Park, Ins.* 401. This case is put upon the general words, "*all other perils*." At the trial before Lord

And by the explosion of a steamboat boiler :<sup>1</sup>

And by taking the ground in consequence of the falling of the tide :<sup>2</sup>

And by corrosion of metals in consequence of actual contact of sea-water occasioned by a leak caused by the perils insured against,<sup>3</sup> and not by mere general dampness,<sup>4</sup> or by bad stowage :<sup>5</sup>

And by a ship being blown over at the time of hauling it up on a marine railway :<sup>6</sup>

And by fire :<sup>7</sup>

And damage to the vessel or cargo insured, by collision with other vessels, whether without any fault or through carelessness :<sup>8</sup>

And damage by fault of the master and mariners of the vessel insured :<sup>9</sup>

Or by the fault of the master and mariners of another vessel.<sup>10</sup>

There is no question that collision is a peril of the seas, and that underwriters are liable for damage thereby to the insured

Ellenborough, he said, this loss was by a "peril ON the seas, not OF the seas." The distinction is fanciful, since it would put winds and lightning out of the class of perils of the seas, as being those of the atmosphere, &c.

<sup>1</sup> *Perrin's Adm'rs v. Protection Ins. Co.* 11 Ohio, 147; *Citizens' Ins. Co. v. Glasgow*, 9 Mo. 406. The phrase, "perils of the river," is substituted, in the trade on the Mississippi and Ohio, for that of "perils of the seas," in maritime policies. "Perils of the seas, rivers, &c.," is held to cover canal navigation: *Protection Ins. Co. v. Wilson*, 6 Ohio St. 553.

<sup>2</sup> *Fletcher v. Inglis*, 2 Barnew. & Ald. 315.

<sup>3</sup> *Cogswell v. Ocean Ins. Co.* 18 La. 84, which was the case of a corrosion of zinc.

<sup>4</sup> *Baker v. Manufacturers' Ins. Co.* 12 Gray, Mass. 603.

<sup>5</sup> *Ship Abby Pratt*, 6 La. Ann. 410.

<sup>6</sup> *Ellery v. New England Mar. Ins. Co.* 8 Pick. Mass. 14, as being ejusdem generis with the perils specifically enumerated.

<sup>7</sup> This would be the construction no doubt, though the peril were not specifically insured against.

<sup>8</sup> *Buller v. Fisher*, 3 Esp. 67; *Peters v. Warren Ins. Co.* 1 Stor. C. C. 463; 3 Sumn. C. C. 389; 14 Pet. 99; *Caldwell v. St. Louis Perpetual Ins. Co.* 1 La. Ann. 85, which was a case of injury to the stern boat of a steamboat in river navigation.

The Boston companies inserted, April, 1867, into their policies on vessels, the provision not to be liable for damage to another vessel by collision.

<sup>9</sup> *Supra*, s. 2, No. 1049.

<sup>10</sup> *Smith v. Scott*, 4 Taunt. 126. The marine ordinances of various countries and earlier treatises contain many provisions on this subject of collision. *Pothier, Ins.* n. 50; *Ord. Copenh.* art 14.

vessel; but it has been made a question whether the underwriters are liable to indemnify the assured for the amount which he has been liable to pay to the owners of another vessel, for damage done to it by collision with his own, which question is subsequently considered.<sup>1</sup>

Losses by the inevitable operation of the elements, or any vis major insured against, happening in port, are usually classed as perils of the seas; but Mr. Justice Story considered theft without violence, and embezzlement "in port," as not coming within that description.<sup>2</sup>

Damage to the ship, occasioned by its taking the ground in a harbor when the tide fell, was however held to be a loss by "perils of the seas."<sup>3</sup>

But Lord Kenyon ruled that the insurers against these perils were not liable for the damage to a ship which was bilged by being hove out to repair, not being strong enough to bear the strain;<sup>4</sup> though the ground of the ruling does not appear. And Sir James Mansfield and his associates of the English Common Pleas held, that where a vessel hove out for repairs was injured by reason of the blocks with which it was propped being removed by force of the tide, the underwriters were not liable for the damage as being by a peril of the seas, because the vessel was on land,<sup>5</sup> a reason inconsistent with other cases.<sup>6</sup>

In respect to perils of the seas, it is frequently difficult to distinguish what DEGREE of the peril brings it within the stipulation of indemnity; for, as we have already seen, the insurers only stipulate to make indemnity for the extraordinary consequences of the unusual and extraordinary operation of these perils. The

<sup>1</sup> *Infra*, No. 1137 a, 1416-1419.

<sup>5</sup> *Thompson v. Whitmore*, 3 Taunt.

<sup>2</sup> *King v. Shepherd*, 3 Stor. C. C. 227.

<sup>3</sup> *Fletcher v. Inglis*, 2 Barnew. & Ald. 315; and *Ellery v. New England Mar. Ins. Co.* 8 Pick. Mass. 14; and the

<sup>4</sup> *Rowcroft v. Dunsmore*, 3 Taunt. 228. Lord Kenyon is said to have remarked that it was an accident; this could not, however, be any reason against the liability of the underwriters.

<sup>6</sup> See *Fletcher v. Inglis*, 2 Barnew. & Ald. 315; and *Ellery v. New England Mar. Ins. Co.* 8 Pick. Mass. 14; and the case of loss by the tackle and furniture of the ship being burnt in a storehouse (Bank Saul) at Canton, while the ship was under repairs, being stored there according to the usual practice in the voyage. *Pelly v. Royal Exch. Ass. Co.* 1 Burr. 341.



perils of the seas include more especially the danger from the winds and waves, yet the underwriters are not understood to promise indemnity for the merely ordinary injury and gradual wearing out of the sails and rigging, by use and the constant action of the elements.<sup>1</sup>

If a vessel at sea is not heard from for a long time, it is presumed to have perished by perils of the seas.<sup>2</sup> By some policies it is provided, that a vessel not heard from for a certain time shall be presumed to have been lost. But if the policy contains no provision of this sort, the length of time which will be the ground of this presumption will evidently depend upon the distance and particular circumstances.<sup>3</sup>

1100. *In respect to damage by rats and vermin, it seems to be implied by the expressions of the judges in some instances, that it does not arise from the kind of perils insured against. But the doctrine against the liability of the insurers for this species of loss is most frequently put upon the grounds that it is not an extraordinary loss, and also that it happens through the fault of the assured, or that of his agents which is imputable to him.*

A case was decided in the time of Chief Justice Lee, respecting a claim for damages for the injury done to goods by rats. The goods were injured in this manner, while they were in the possession of a hoy-man, for the purpose of being transported from one port to another in England. It was held that the hoy-man was answerable for the damage, upon the principle that this was not a loss by an *act of God or the king's enemies*, and the hoy-man was answerable, as a common-carrier, for damage to the goods arising from every other cause.<sup>4</sup> And its not being considered to be an inevitable accident is in favor of the rule that underwriters are not liable for it.

According to the old books and sea-laws, the owners of the ship are not liable for damage to the goods from this cause, provided the captain takes a cat on board, at the beginning of the voyage. This supposes that the loss may be inevitable, and that it is not in all cases owing to the negligence of the master and crew.

<sup>1</sup> See *infra*, No. 1105.

<sup>3</sup> *Gordon v. Bowne*, 2 Johns. N. Y.

<sup>2</sup> *Green v. Brown*, 2 Strange, 1199; 150.

*Newby v. Read*, Park, Ins. 106, 7th ed.;

<sup>4</sup> *Dale v. Hall*, 1 Wils. 281.

*Twemlow. Oswin*, 2 Campb. 85.

Emerigon<sup>1</sup> considers the insurers not to be answerable, in general, for this sort of damage, because it might be prevented by proper care. He cites many authors as being of his opinion, who all seem to adopt the principle of the old sea-laws, that the owners of the ship are answerable for this damage, unless the captain provides against it. To this effect they cite the rule of the Civil Law, that, if cloths intrusted to a fuller are injured by mice, while in his possession, he must make good the damage.<sup>2</sup> Straccha<sup>3</sup> considers the insurers not to be liable for damage by rats or mice, on the ground that it might be prevented by proper care and diligence.

A case on this subject came before the Supreme Court of Pennsylvania, upon a policy on a vessel at and from St. Domingo to the United States. After sailing, she proved to be leaky, and was compelled to put back to Cape St. François, where, on a survey, the timbers were found to have been very much injured by the rats. The case was elaborately argued on both sides. It was the opinion of the court, that this was among those casualties comprehended under perils of the seas, and for which the insurers are liable.<sup>4</sup>

A similar case came before Lord Ellenborough. Goods being insured for a voyage from London to Honduras, the vessel, in the course of the voyage, was detained at Antigua by the sickness of the crew, and while she lay there the rats ate holes in her transoms and bottom, whereby she was rendered unfit for proceeding upon the voyage, and the cargo was sold at Antigua. Lord Ellenborough held that this did not constitute a loss for which the underwriters on the goods against perils of the seas are liable.<sup>5</sup>

It has been held in New York, by Savage, C. J., and his associates, that damage to bear-skins by rats, on a passage from New Orleans to New York, was not necessarily a "peril of the seas" within the meaning of those terms in the bill of lading; but that its being so or not must depend upon due diligence on the part of the master and mariners to prevent it.<sup>6</sup>

<sup>1</sup> Emerigon, chap. 12, s. 4.

<sup>2</sup> D. 19. 2, 13. 6.

<sup>3</sup> Straccha, De Assec. 817, Part 4,  
n. 31.

<sup>4</sup> *Garrigues v. Cox*, 1 Binn. Penn.  
592.

<sup>5</sup> *Hunter v. Potts*, 4 Campb. 203.

<sup>6</sup> *Aymar v. Astor*, 6 Cow. N. Y. 266.

This is plainly a question for the jury, and I infer, on the whole, that

*The insurers may be liable for this species of damage where it happens on a voyage, notwithstanding proper vigilance and precautions against it.*

1101. *It has been held that the destruction of the vessel's bottom by worms is not a peril of the seas.*

A case came before Lord Kenyon, relating to a vessel so destroyed on the coast of Africa. A special jury were of opinion, "that this was not a loss within the terms of 'perils of the seas,' in policies of insurance; and Lord Kenyon was of this opinion."<sup>1</sup>

Mr. Justice Livingston, alluding to this case, said: "I do not mean to be understood as subscribing to the opinion of Lord Kenyon."<sup>2</sup>

But his opinion has been adopted in Massachusetts. A ship's bottom was injured by worms during the time of her detention by an embargo at Cape St. François. In respect to a claim for indemnity against the insurers for this damage, the court, speaking of the preceding case, said it was decided upon the ground, that the loss was like the wearing and natural decay of the vessel.<sup>3</sup>

Some persons, conversant in the practice of insurance, consider insurers to be exempted from liability for this species of loss, on the ground that it arises from the fault of the assured. It is a kind of injury which occurs only in warm climates, and they say that a ship is not fit to be employed in those climates, unless she is secured by a copper sheathing against this kind of damage. But a distinction has been suggested in this respect, which seems to be very reasonable, upon the supposition that the underwriters are exonerated from this risk, upon the ground above mentioned. It is suggested, that if the copper sheathing is torn off by stranding, or other perils of the seas which are insured against, and in consequence of this accident the vessel's bottom is eaten by worms, the insurers are liable for the damage.

<sup>1</sup> *Rohl v. Parr*, 1 Esp. 445.

<sup>2</sup> *Depeyster v. Columbian Ins. Co.* 2 Caines, N. Y. 85.

<sup>3</sup> *Martin v. Salem Ins. Co.* 2 Mass.

420. In a common printed form of policy used in Charleston, S. C., it is provided that the insurers shall not be answerable for this species of damage.

Upon the doctrine already stated, that insurers are not liable for ordinary damage, the Supreme Court of the United States has held, that, in seas where worms ordinarily assail the bottom of ships, this damage is not a loss by perils of the seas, within the meaning of the policy.<sup>1</sup>

1102. *The expense and loss attending a mere detention and delay, on account of perils of the seas, at a port in the course of the voyage, must be borne by the owner of the ship, though the delay continues for a long time.*

On a voyage from a port in the Baltic to London, the ship was unexpectedly detained by the ice, and, instead of proceeding on the voyage immediately, could not sail until the following season. This was considered to be one of those ordinary inconveniences and interruptions of the voyage, the expense of which must be borne by the owner.<sup>2</sup>

1103. *If the vessel goes out of the course of the voyage for the purpose of refitting and repairing damage sustained from the perils insured against, it is held in the United States that this is to be done at the charge of the insurers.*

But though the delay and departure from the course are considered to be extraordinary occurrences, for which the insurer is bound to make indemnity, a distinction is made between what is ordinary in the expense and damage occasioned by the delay, and so to be borne by the owner of the vessel, and what is extraordinary, and for which the insurer is answerable. The owner loses the earnings of the vessel during the time of its detention, but he has no claim against the insurer on this account.

1104. *In respect to the expense, on account of the wages and provisions of the crew, during the period of voluntary departure from the course, and delay, for the purpose of refitting, the rule in the United States, sanctioned by all the American courts, is different from that in Great Britain.*

In one case,<sup>3</sup> in which the ship put into Nice in distress, where the captain discharged the crew and then hired them to assist in repairing the ship, the court in England considered their wages, while so employed, as constituting a part of the loss within the

<sup>1</sup> Hazard v. New England Mar. Ins. Co. 1 Sumn. C. C. 218; 8 Pet. 557.

<sup>3</sup> Da Costa v. Newnham, 2 Term, 407.

<sup>2</sup> Everth v. Smith, 2 Maule & S. 278.



policy, upon the ground that "they did not work as sailors, but as common workmen." But *the expense* of wages and provisions of the crew, as such, during a delay for repairs, *is* very distinctly and explicitly considered in practice,<sup>1</sup> and *held* by the courts *in England, to be a charge upon the owner*, and not a part of the loss within the policy, either upon the ship or freight.

It seems that formerly some insurers in England were of a different opinion,<sup>2</sup> and on the continent of Europe these charges appear to be more generally considered as part of the loss within the policy, in case of a vessel's putting into a port to refit; though some writers doubt the propriety of this rule. Adrian Verwer says: "Why should the victualing and men's wages be deemed a general average, any more than the interest of the money, and the damage caused to the cargo by the delay?"<sup>3</sup> The French Code makes the insurers liable for this charge only in case of the vessel's being chartered by the month.<sup>4</sup>

*In the United States*, the rule is general and uniform, that *the underwriters are in this case liable for the expense of wages and provisions*.<sup>5</sup> One reason for this seems to be, that the extraordinary circumstances under which this expense is incurred may be supposed to change the nature and character of these expenses, and to render the insurers liable for them upon the same principles on which they are liable for any loss. If the loss is paid upon this ground, it shows that the construction put upon these expenses, as being ordinary and like the wear and tear and decay of the vessel, or otherwise, is different in England and the United States. But supposing these expenses not to be considered in the United States of the kind for which insurers are liable, according to the general principles by which their liability is usually determined, still there is a reason for making an exception in this case. A vessel quits her course to refit, that she may prosecute the voyage with greater safety, and it is evidently for the general interest of the insurers, as well as the assured, to remove, as much as possible, every discouragement to the use of precautions and

<sup>1</sup> Stevens, c. 1, a. 2, s. [e]; *Plummer v. Wildman*, 3 Maule & S. 482.

<sup>4</sup> Code de Commerce, a. 403.

<sup>2</sup> Beawes, tit. Salvage, Average, &c., Vol. I. p. 157; 1 Magens, 67, s. 57.

<sup>5</sup> *Padelford v. Boardman*, 4 Mass. 548; 8 Johns. 307; 2 Caines, 263; *Id.* 274.

<sup>3</sup> 1 Magens, 68.

all practicable means for the safe prosecution of the voyage, and insurers may upon this ground of expediency assume a liability for these expenses.

The liability of the insurers for wages and provisions in case of detention seems to be very similar to the same charges in case of delay for the purpose of refitting, as far as this liability depends upon the extraordinary circumstances under which the expense is incurred, since a detention by capture, or an embargo, is as extraordinary, and as much out of the usual course of things, as a delay to refit. These two cases are considered similar in the Marine Law of France.<sup>1</sup> The liability of the insurers for this expense will be considered subsequently.

1105. *Underwriters are liable only for extraordinary damage to the ship, as distinguished from ordinary wear and tear and deterioration by time.*

“Were insurers,” says Magens,<sup>2</sup> “obliged to pay for every cable and rope that breaks, or for every sail that splits, or blows to pieces, there would be no other way of insuring ships, but free of all particular average.”

Where a vessel is wrecked; or damaged by stranding; or rolls away her masts in a rough sea; or has them carried away in a gale; there is no question of the liability of the underwriters. So if, to escape from some imminent peril that is insured against, it is necessary to cut away the mast, or cut a cable, or throw overboard a part of the cargo, the circumstances and the sacrifice, being extraordinary, constitute a valid claim for indemnity. But if a cable is worn off while the vessel lies at the usual anchoring-place, and without any extraordinary action of the perils insured against, or if a sail is split in the ordinary course of navigation, it is the owner's loss.

It is difficult to give examples by way of illustrating the distinction of what is ordinary from what is extraordinary, in losses and damages of this description, without getting upon disputed ground. But the only satisfactory mode of illustrating this distinction is by instancing actual adjustments of losses, since the common usage and understanding among practical men is undoubtedly the best authority upon this subject.

<sup>1</sup> Code de Commerce, ut supra.

Stevens on Average, c. 3; Benecke &

<sup>2</sup> Magens, Chap. 1, p. 52, s. 51, cited Stevens by Phil. p. 366.

In some instances, as *where the timbers of the ship are broken*, the damage done is a sufficient proof of the extraordinary degree of the operation of the peril. It can in general be pretty satisfactorily determined whether an injury to the body of the ship is a proper subject of indemnity, the question of most frequent occurrence in regard to such damage being, whether the extent of the injury does not rather prove the ship to have been unseaworthy, than that the peril was extraordinary. But if it be assumed that the ship was seaworthy, it is in general not difficult to determine whether an injury of this kind is a loss within the policy.

It is sometimes a subject of doubt, whether the *damage to the sheathing* is to be repaired at the expense of the insurers. The sheathing will necessarily be destroyed and worn off by use, and damage of this sort ought to be considered ordinary, and fall upon the owner, except in cases of the vessel's striking, or where some other injury, sustained by the vessel at the same time shows that it was exposed to great violence. Injuries of this sort, which are to be considered only the wear and tear of the ship, are distinguished from those which constitute a loss within the policy, by taking into consideration the age and strength of the sheathing, and all other circumstances which show to how great a degree of violence the vessel has been exposed.

The *damage to the upper works of the vessel* is frequently the subject of particular average, and would be more frequently so, did not the amount of this species of damage often come within one of the exceptions of the policy. If any part of the upper works is carried away, or broken in such a manner as to make a specific injury, which is the proper subject of repairs, it is always considered a loss within the policy, unless it falls within the exception of losses under three or five per cent.

The same rule applies to the masts and spars. If *a mast is sprung*, or if *spars are carried away or broken*, the fact of their being so is usually considered a sufficient proof of a degree of violence against which the insurers undertake to make indemnity.

The boat is considered, to the purposes of insurance, to be a part of the ship.<sup>1</sup> If *a boat is washed overboard*, it is considered

<sup>1</sup> Stevens, Part I. c. 3, a. 4; Benecke & Stevens by Phil. p. 369.

to be a species of loss that is insured against, unless the accident happens through the fault of the captain and crew. If a boat lashed upon deck is washed overboard, all insurers agree that this is one of the kinds of loss insured against.

Mr. Stevens says it is the same if the *boat* is “properly *lashed to the quarters*.”<sup>1</sup> But whether a boat may be “properly” lashed in this situation seems to depend upon the number of boats that it is necessary to carry, and upon the size and employment of the vessel. The employment of whaling ships makes it necessary to carry the boats on the outside of the ship, and no objection is made to paying for a boat, which is lost on a voyage of this description, on account of its being carried in this situation. Men-of-war and large merchant-ships carry boats at the stern and on the quarters, but the former situation is said to be much the less exposed of the two. In regard to merchant-vessels generally, however, if a boat fastened to the stern-davits is damaged or lost, by whatever degree of violence of the waves, it is the more general opinion of writers and practical insurers, that the loss cannot be claimed under the policy,<sup>2</sup> this being said not to be a proper and safe situation of the boat. Some insurers adhere to this rule strictly in practice. Others pay for a boat thus fastened, out of a willingness to put a liberal construction upon their contract, in favor of the assured; though they think the risk on a boat so carried is greater than if it were lashed on deck, and that it is the fault of the master to carry it in this manner.

But others make no objection to the payment of the loss in such a case, because they say that it is convenient in general to carry a boat at the stern, which may be readily lowered to save a man who may be washed overboard, or to take up any thing that may be dropped overboard. The loss of a boat so carried by vessels navigating the Mediterranean, was formerly paid for without objection, because the carrying of the boat in this situation often facilitated the escape of the crew in case of the capture of the vessel by corsairs.<sup>3</sup>

In a case on a policy in the Supreme Court of Massachusetts, evidence being introduced on both sides of the question, whether it was proper in a West India voyage to carry a boat at the stern,

<sup>1</sup> Stevens, Part I. c. 3, a. 5; Benecke & Stevens by Phil. p. 370.

<sup>2</sup> Stevens, Part I. c. 3, a. 5.

<sup>3</sup> 1 Emerigon, 624, c. 12, s. 41.



slung on the davits, the court considered the burden to be upon the underwriters to show that it was an improper place to carry the boat, and that, by the evidence in that case, this did not appear to be an improper way of carrying the boat.<sup>1</sup>

It is the most difficult to distinguish what is wear and tear, and decay, from the damage which constitutes a loss, in the case of *sails, rigging, cables, and anchors*. If the sails are necessarily cut away in order to save the masts or yards, and for the general safety, or a cable is cut or slipped for the purpose of escaping from an impending peril, which is insured against, or a hawser is used to secure a temporary rudder, or to supply the place of a parted shroud, or sails and ropes are used for the purpose of stopping a leak, though the thing sacrificed is old and would soon have been worn out and destroyed by use, yet the voluntary sacrifice of it gives a valid claim against the insurers for compensation according to its value.

But where the damage or loss is not voluntary, it is difficult, in many instances, to determine whether it ought to fall upon the owner of the vessel or the underwriter. The parting of a rope or cable, or the splitting of a sail, is not in itself necessarily a proof of the extraordinary operation of the perils of the seas, for this will happen from use and decay in the most favorable weather, and under the most fortunate circumstances. Damage or loss of this sort, therefore, commonly belongs to the owner of the vessel to bear, and does not constitute the ground of any claim against the insurer, unless it takes place out of the common course of things, or appears to be the effect of the unusual and violent operation of a peril insured against.

If a vessel at her port of destination, or any port in the due course of the voyage, and without any gale or unusually rough sea, being at anchor on a "foul" or rocky bottom, has her *cable chafed* off, some say it is the owner's loss as a part of the wear and tear; others consider it a loss within the policy, as being an extraordinary specific damage, which could not have been avoided.

A vessel which was insured against capture and perils of the seas, being captured on suspicion of having enemies' goods on board, and carried into Plymouth, was anchored by the prize-master in the outer harbor on a "foul" bottom, but where ves-

<sup>1</sup> Hall v. Ocean Ins. Co. 21 Pick. Mass. 472.

sels frequently anchor. The cable was chafed off, and the anchor thereby lost, though the weather had not been boisterous, or the sea remarkably rough. The vessel was released, and pursued her voyage. This loss was paid without objection by the insurers; though it possibly might not have been, if the vessel had gone to Plymouth in the regular course of the voyage,<sup>1</sup> but the being taken out of the course by one of the perils insured against, and the extraordinary circumstances of the case, were considered as rendering this damage, without any doubt, a loss within the policy.

Where the cable of a vessel was cut off, during a violent gale, by being brought across the chain cable of another ship, the loss was paid without any question by the underwriters. It was a positive specific loss, in consequence of an unusual and extraordinary degree of peril.

In distinguishing the wear and tear of the ship from the damage which constitutes a loss, the cases of a *vessel* losing an anchor by being *compelled* by the perils insured against *to come to anchor in an unusual place*, or to carry a press of sail to escape an enemy, or to keep off from a lee-shore, have been very much discussed, and are said to have been the subjects of elaborate treatises in Germany. Magens mentions the case of a ship that was compelled to anchor in a rocky place by Heligoland, where several of her cables parted. This was considered at Hamburg to be a loss on the ship. He says, if such a loss does not come within the policy, "it ought to be compensated as a good piece of service,"<sup>2</sup> which implies a doubt whether it came within the policy.

The same writer says: "We remember at London, where ships, *endeavoring to keep clear of a lee-shore*, had new sails blown away and cables parted by *anchoring in an open sea*, to avoid driving ashore, the losses were made good by the insurers, whose interest it always is to make it the master's interest to spare nothing, in such extraordinary cases, to save the ship from stranding."<sup>3</sup>

In the United States these two descriptions of loss are most generally, if not invariably, considered as coming within the

<sup>1</sup> 2 Valin, 81, tit. Insurance, a. 29.

<sup>2</sup> 1 Magens, 53, s. 51.

<sup>3</sup> 1 Magens, 53, s. 51.

stipulation of indemnity. It does not distinctly appear that these losses are considered in England as coming within the policy.<sup>1</sup>

It will be subsequently considered in what cases any of the preceding losses are general or particular average. To whichever of these descriptions a loss belongs, the principles by which it is determined to be within the policy are the same; it must in either case happen under extraordinary circumstances, or result from the extraordinary operation of the perils insured against.

#### SECTION IX. PIRACY, ROBBERY, THEFT.

1106. *Under the clause for indemnity for loss by "pirates, robbers or rovers, and thieves," the underwriters are liable for piracy, and robbery, and plunder by force, by persons not belonging to the vessel, or by the mariners belonging to it, where it could not have been prevented by reasonable vigilance and precautions.*<sup>2</sup>

A wrongful seizure and sale of a cargo by a consul of the United States, does not come within "piracy, robbery or theft."<sup>3</sup>

According to the old authorities, the risk of piracy would be covered under "perils of the seas," though it were not expressly insured against in the policy under the description of piracy. It has been determined, that, in the case of charter-parties, by which it is stipulated to convey and deliver goods, the perils of the seas excepted, it is a loss by the perils of the seas under this exception, where the vessel is robbed or is taken by pirates.<sup>4</sup>

Under this clause Lord Kenyon thought the assured would have been entitled to indemnity for a loss on a cargo of corn, occasioned by a mob that came on board of a vessel lying at Elly Harbor, in Ireland, and took the government of her from the captain and crew, and ran her upon a reef of rocks, whereby the cargo was damaged, had the insurers not been exempted from the loss under the memorandum against partial losses on that article. He said, "If a partial loss could have been recovered

<sup>1</sup> Stevens, Part I. c. 3, a. 9; 5 Bos. & P. 378; Benecke & Stevens by Phil. 372.

<sup>3</sup> Paddock v. Commercial Ins. Co. 2 All. Mass. 93.

<sup>4</sup> 1 Roll. Abr. 248, pl. 10; Comb. 56;

<sup>2</sup> See Malynes, Lex. Mer. c. 25, 4th ed. p. 295; Emer. tom. 1, c. 12, s. 29. Park. Ins. 103.

upon this policy, the assured might have recovered for a loss by pirates." <sup>1</sup>

Under the risk of pirates and rovers, or under perils of the seas, the insurers are liable for losses by a mutiny of the crew.<sup>2</sup>

Insurance being made on the interest of the assured on account of his advances for shipping 350 coolies from China for Peru against piracy and other perils, the coolies mutinied, got possession of the ship, changed the course, and landed at some place out of Peru, and escaped. This was held by Pollock, C. B., and Park, B., Platt, B., and Martin, B., of the English Exchequer, to be a loss by piracy. "The running away with the ship being as much the cause of the loss, as if it had been seized by strangers and the cargo had consisted of wild animals which had escaped and could not be caught."<sup>3</sup>

And under a warranty "free from seizure," a similar loss was held to come within the exception.<sup>4</sup>

In some policies the insurers agree to indemnify against loss by "assailing" thieves, instead of "rovers" or "thieves" simply.

There is a distinction between plunder committed with superior force, and simple larceny. It is for the purpose of adapting the policy to this distinction, that some underwriters have introduced the phrase "assailing thieves."

A policy against thieves simply has not been considered to cover a loss by theft, except that which is accompanied by violence, or committed under circumstances in which it could not be prevented.<sup>5</sup>

Weskett<sup>6</sup> thinks that the insurers are not answerable for "thefts committed during the night by land robbers, who come on board while the vessel is in port." He is speaking of a case of theft without violence. And this construction is adopted by Mr. Justice Story.<sup>7</sup>

<sup>1</sup> Nesbitt v. Lushington, 4 Term, 783.

<sup>2</sup> Brown v. Smith, 1 Dow, Parl. Cas. 349.

<sup>3</sup> Nayler v. Palmer, 8 Exch. 739, 22 Eng. L. & Eq. 573. Affirmed on appeal in the Exchequer Chamber. Palmer v. Nayler, 10 Exch. 382; 26 Eng. L. & Eq. 455.

<sup>4</sup> Kleinwort v. Shepard, 1 Ell. & E. 447.

<sup>5</sup> Hartford v. Maynard, Park, Ins. 33. See also 1 Emerigon, 534, c. 12, s. 29; Roccus, n. 42; 1 Magens, 76, s. 63; 3 Kent, Comm. 303, 3d ed.

<sup>6</sup> Weskett, tit. Theft.

<sup>7</sup> Magoun v. New England Ins. Co.



Mr. Chancellor Walworth, of New York, has held that underwriters are answerable under this risk for loss by theft committed without violence by persons not belonging to the ship while it lies at the wharf.<sup>1</sup>

Under a policy on goods against loss by, and "barratry of the master and mariners," and by "thieves," without the qualification "assailing," on a voyage from New York to New Orleans, and thence to Tuscumbia, in Alabama, the insurers were charged in New York with the loss of a part of the goods, probably stolen by passengers or others, found to be missing from the packages on their being opened at Tuscumbia, due vigilance and precautions against theft being presumed and the burden of proving the contrary being considered to be upon the underwriters.<sup>2</sup>

An opposite decision has been made by the Supreme Court of Tennessee, in case of insurance of goods from New York via Pittsburg to Nashville, part of which were alleged, in the declaration for loss, to have been stolen by persons connected with the boats by which the goods were sent. On demurrer, the judgment was against the claim for the loss.<sup>3</sup>

Where the policy is against "thieves" simply, the provision is too explicit and definite to admit of the exclusion of all simple larceny, since it would cancel this provision, since larceny by violence is insured against as robbery. The Continental jurisprudence of Europe is not applicable on this question, as has been justly remarked by Mr. C. J. Savage, of New York,<sup>4</sup> at least under some forms of policy in use on the Continent, as those of Nantes and Lisbon given by Boulay Paty,<sup>5</sup> where the term "pillage" is used in the former, and in the latter some term translated by the same author as "pillage," which I do not understand to be precisely equivalent to our term "theft."

Accordingly, I conclude that in a policy against robbers and thieves, without the qualification "assailing," the insurers are liable, as stated above, for theft committed on the voyage in spite

1 Stor. C. C. 157; and see *Roccus, Ins.* n. 42.

1 *Atlas Ins. Co. v. Storrow*, 5 Paige, Ch. N. Y. 285.

2 *American Ins. Co. v. Bryan*, 26 Wend. N. Y. 563; 1 Hill, N. Y. 25.

3 *Marshall v. Nashville Ins. Co.* 1 Humphr. Tenn. 118.

4 *American Ins. Co. v. Bryan*, 26 Wend. N. Y. 563.

5 *Cours de Droit Mar.* tom. 3, ed. 1822, p. 284, 287.

of due vigilance and precautions against it, and especially where the goods are at the time put out of the control and superintendence of the assured, and his agents and representatives appointed by him, by the operation of the perils insured against or of perils to which it was evident that they must be exposed though not insured against in the policy.

The clause "loss by enemies, pirates, and assailing thieves," covered seizure by the so-called Confederate States of America during the rebellion.<sup>1</sup>

1107. *The underwriters are answerable for loss by plunder in direct consequence of the insured subject being at the time put out of the possession and control of the master and other agents appointed by the assured, by shipwreck or other peril insured against, though theft or plunder is not specifically insured against; whether the pillage is committed on the water or on land. It is a general doctrine, that all the loss directly consequent upon a peril is covered by insurance against it.*<sup>2</sup>

Pothier<sup>3</sup> says the insurers are liable for loss by plunder on shore, after the shipwreck of the vessel.

The reason given by Emerigon<sup>4</sup> for this construction is, that it would be a case of total loss, by which the property passes to the underwriters, and thus the loss by plunder would be directly their own; *res perit domino*. But this would not necessarily be the case, according to the construction of this contract in England and the United States, since the assured is not obliged to abandon and claim for a total loss, but has his election to claim either for a total or partial loss.

The doctrine just stated has been recognized in the case of a policy on goods from London to the Isle of France, in which some of the goods were saved, after shipwreck, and got on shore at the Isle of France, where they fell into the hands of the natives, who destroyed a part and stole the remainder.<sup>5</sup>

<sup>1</sup> *Monongahela Ins. Co. v. Chester*, 43 Penn. St. 491; *Dole v. Merchants' Ins. Co.* 51 Me. 465.

<sup>2</sup> *Magoun v. New England Mar. Ins. Co.* 1 Stor. C. C. 157; and see *supra*,

No. 1098 a.; *infra*, No. 1129, 1132, 1134, 1136, 1137.

<sup>3</sup> Pothier, *Insurance*, n. 55.

<sup>4</sup> Emerigon, c. 12, s. 29.

<sup>5</sup> *Bondrett v. Hentigg*, 1 Holt, 149.

## SECTION X. CAPTURE, ARRESTS, RESTRAINTS, AND DETENTION.

1108. In policies of the common form, the property or interest is insured against "takings at sea, arrests, restraints, and detentions of all kings, princes, and people, of what nation, condition, or quality soever." This part of the policy protects the assured against loss by capture and detention. *By capture is meant the taking possession of property with the purpose of appropriating it to the captor's own use, by which it is distinguished from a mere detention, with the design of ultimately liberating the property, as in the case of an embargo.*<sup>1</sup>

*A seizure is equivalent to a capture, as it is made with the intention of depriving the owner of his property in the subject.*<sup>2</sup>

1109. *The policy extends to captures, arrests, and detentions by public enemies; by belligerents, where the property insured is neutral;*<sup>3</sup> *or by the government of which the assured is a subject,*<sup>4</sup> *for any cause other than a violation of law:*

*As the taking of a vessel by government to be used as a fire-ship:*<sup>5</sup>

*Or the capture of a neutral ship by captors acting under the belligerent government of which the underwriters are subjects, provided the risks may be legally insured against:*<sup>6</sup> *or seizure of a ship under authority of the Confederate States of America, so-called.*<sup>7</sup>

*But does not apply to a violent taking possession of the ship by a mutinous crew.*<sup>8</sup>

1110. The above-quoted clause of the policy is more generally understood to apply to captures, seizures, and detention by the commissioned officers and agents of some lawful and acknowl-

<sup>1</sup> 1 Emerigon, 535, c. 12, s. 30; Pothier, tit. Insurance, n. 56, note by Estrangin.

<sup>2</sup> 11 Johns. N. Y. 287.

<sup>3</sup> Rhinelander v. Ins. Co. of Penn. 4 Cranch, 29.

<sup>4</sup> Nantes v. Thompson, 2 East, 385; and see cases infra. See also Lozano v. Janson, 2 Ell. & E. 160.

<sup>5</sup> Green v. Young, 2 Salk. 444; 2 Ld. Raym. 840.

<sup>6</sup> Anthony v. Moline, 5 Taunt. 711; Schnakoneg v. Andrews, id. 716; Bazzett v. Meyer, id. 824.

<sup>7</sup> Dole v. New England Ins. Co., Dole v. Equitable Ins. Co. 6 All. Mass. 373; Fifield v. The Ins. Co. 47 Penn. St. 166; Dole v. Merchants' Ins. Co. 51 Me. 465.

<sup>8</sup> Greene v. Pacific Ins. Co. 9 All. Mass. 217.

edged government. Accordingly Mr. Justice Buller said, the word "people" in this clause "means the supreme power; the power of the country, whatever it may be."<sup>1</sup> Thus the court considered the loss of a cargo of corn by a mob at Elly Harbor as coming under the clause relating to piracy.

The word "capture" is of itself broad enough to comprehend any forcible seizure, arrest, or detention, which may be lawfully insured against. Loss on a slave cargo by the insurrection of the slaves, has been held in Louisiana to be covered under "capture."<sup>2</sup> But the specification of captures, &c., "by kings, princes, and people," has been held to limit the construction of this provision of the policy materially.

1111. *If the vessel is detained by an embargo*, whether imposed by the government of which the parties are subjects, or by a foreign government, *it is an arrest and restraint* within the meaning of the policy.<sup>3</sup>

1112. *And so if it is stopped for search*, and sent in for examination.<sup>4</sup>

1113. *In case of the voyage being broken up and renounced on account of the probability or certainty of loss by a peril from which the underwriters are expressly exonerated, they are not liable.*

Insurance being made on a cargo from New York to ports in the Gulf of Mexico and back, "free from seizure or detention on account of illicit or prohibited trade," the vessel, after putting in at St. Ander, one of those ports, and delivery of the cargo, on an agreement with General Mina, commander of the Independent forces then in possession of the place, the master was compelled to leave for fear of capture by some Loyalist ships that hove in sight; and before there was opportunity to return and deliver the cargo, the place had been retaken and was occupied by the Loy-

<sup>1</sup> Nesbitt v. Lushington, 4 Term, 783.

<sup>2</sup> M'Cargo v. New Orleans Ins. Co. 10 Rob. La. 202.

<sup>3</sup> Greene v. Young, 2 Ld. Raym. 840; 2 Salk. 444; Page v. Thompson, Park, Ins. 8th ed. 175; Touteng v. Hubbard, 3 Bos. & P. 291; Code de Commerce, a. 369, 370; Beawes, 268, tit. Embargo; Grotius, de Jure Bel. l. 2, c. 2, s. 10; 1 Blackst. Com. 270; Blackenhagen v. London Ass. Co. 1 Campb.

454; Rotch v. Edie, 6 Term, 413; Olivera v. Union Ins. Co. 3 Wheat. 183; Odlin v. Ins. Co. of Penn. 2 Wash. C. C. 312; M'Bride v. Marine Ins. Co. 5 Johns. N. Y. 299; Walden v. Phœnix Ins. Co. id. 310; Ogden v. N. Y. Firemen's Ins. Co. 10 id. 177; 12 id. 25; Lorent v. South Carolina Ins. Co. 1 Nott & M'C. So. C. 505; 3 Kent, Comm. 3d ed. 291.

<sup>4</sup> 1 Magens, 67.



alists, and, had he entered, the cargo would have been seized as prohibited goods, and also on account of the master having intended to supply the Independents; whereupon he gave up the voyage, and returned with the original cargo to New York. The Supreme Court decided that the underwriters were not liable for a total loss on the cargo by the loss of the voyage.<sup>1</sup>

1114. *Under the perils of arrests, restraints, and detention, the insurers take the risk of detention in a port by its being effectually blockaded.*

In an elaborate case before the Supreme Court of the United States, on a policy in favor of Spanish subjects on a cargo from Baltimore to Havana, the vessel having sailed and being near the mouth of the Chesapeake, February, 1813, the master descried four British frigates, officers from which boarded his vessel and indorsed upon the papers that the Bay of Chesapeake was under blockade, and ordered him to return, and not again to attempt to come out. The blockade was not known in Baltimore when the vessel sailed. The voyage was thereupon given up, and the cargo abandoned to the underwriters. This loss was held to be covered; and Mr. C. J. Marshall, giving the opinion of the court, remarked that an embargo was admitted to be a peril within the policy. "The application of force is not more direct on the vessel stopped in port by an embargo, than on the vessel stopped in port by a blockading squadron."<sup>2</sup>

A distinction is made by the court in this and also in a subsequent case,<sup>3</sup> between an occlusion in a port, bay, or river, and an exclusion from it; the former being held to be an arrest, restraint, and detention within the policy; the latter, not so.

This distinction had not been made in a prior case in Massachusetts, where, under a policy upon a ship then at Buenos Ayres, the master was prevented from leaving that place by notice from the officers of a British frigate and gunboats lying in the river below that they should capture his vessel if he came down. The court, then consisting of Parker, C. J., and Thatcher, Jackson, Dewey, and Putnam, Justices, decided against the assured,<sup>4</sup> on the authority of a previous decision by Parsons, C. J.,

<sup>1</sup> Smith v. Universal Ins. Co. 6 Wheat. 176.

<sup>2</sup> Olivera v. Union Ins. Co. 3 Wheat. 183.

<sup>3</sup> Smith v. Universal Ins. Co. 6 Wheat. 176.

<sup>4</sup> Brewer v. Union Ins. Co. 12 Mass. 170.

and his associates,<sup>1</sup> on a policy upon cargo, where the port of destination was under constructive blockade by the British Orders in Council, 1807, and the importation was interdicted by some of the decrees of the Emperor Napoleon; from which case the subsequent one is distinguishable, as are those before the Supreme Court of the United States, by the circumstance that in the latter the vessel was restrained from leaving a port.

This distinction just referred to is not taken in a Maryland case of a ship insured from Baltimore to Lisbon, in 1813, and so being about the time of that in the Supreme Court of the United States cited above. In the Maryland case the vessel was also stopped by the British squadron then blockading Chesapeake Bay, and ordered back. This was, however, an insurance on the ship, which differs in respect of the present question from one of the cargo or freight, as we shall see in considering what is a loss of the voyage giving a right of abandonment on these different subjects of insurance, in a subsequent chapter.

1115. *Whether a loss consequent upon the imminency of a capture, arrest, restraint, or detention, is within the risk assumed by insurance against such perils?*

Where intelligence is received on the voyage that the port of destination is blockaded, or the captain is warned that the importation of his cargo is interdicted, and he will be exposed to capture or seizure by proceeding on his course, the question has arisen and been elaborately discussed in numerous cases, whether this is an arrest or detention. Must the captain proceed for his port of destination, notwithstanding such warning, and take the hazard of capture? or must he turn off to some neighboring port, or return to his port of departure, and wait until the blockade, or other obstacle to the voyage, is removed? Or is the voyage broken up so as to make the insurers answerable for a total loss?

It has been held, that if the captain disregards the danger of which he has sufficient notice, and proceeds on the voyage, in such case, whatever loss happens, it will be through his fault, and the assured cannot recover for it, unless the captain's misconduct amounts to barratry.<sup>2</sup>

This is in effect holding that merely the blockade of the port

<sup>1</sup> Richardson v. Maine F. & Mar. N. Y. 249, 260, 263; Richardson v. Ins. Co. 6 Mass. 102. Maine F. & Mar. Ins. Co. 6 Mass.

<sup>2</sup> Schmidt v. United Ins. Co. 1 Johns. 102.

of destination, or interdiction there, is not of itself a detention, arrest, or restraint, so long as the vessel is not taken forcible possession of, although the voyage may be defeated. The effect is to prevent the vessel, at least, from pursuing her course. This is an inevitable accident, which discharges the owners from their obligation, under the charter-party or bill of lading, to transport the cargo to the port of destination,<sup>1</sup> and dissolves the contract with the mariners for wages.<sup>2</sup>

The interruption of the voyage by blockade, interdiction at the port of destination, or the imminent peril of capture, has been said in some cases not to be a loss within the policy, because the insurers are not liable for a loss incurred through fear of a peril, or *quia timet*. It is not easy to say what is the precise import of this maxim respecting fear of a peril.

The common form of the policy provides that, "in case of any loss or misfortune, it shall be lawful for the assured to sue, labor, and travel, in and about the defence, safeguard, and recovery of the property, to the charges whereof the insurers will contribute." If this clause applies only to cases where a direct and visible damage has actually happened to the property, such as shipwreck or capture, still it must have reference to something future; the assured sues and labors to prevent the property from being plundered in one case or condemned in the other, — he has reference to something which he FEARS may take place.

The insurers are liable for what is paid to captors by way of compromise; here the peril has actually overtaken the property; it has been captured; but, in offering a compromise, the assured is determined by the prospect of the condemnation of the property, or of the expense of obtaining its release. What has actually happened — namely, the capture — seems to be of no importance except as it makes detention, or the condemnation of the property, or expense of obtaining its release, probable; and a compromise to prevent an impending capture, which would otherwise be inevitable, seems to stand very much upon the same ground with a compromise to prevent the consequences of a capture already made. Whether the fear is, that the peril will begin, or, having begun, will continue to operate on the property, the

<sup>1</sup> Putnam v. Wood, 3 Mass. 481;    <sup>2</sup> The Saratoga, 2 Gall. C. C. 164.  
Scott v. Libby, 2 Johns. N. Y. 336.

interest of the parties seems equally to require the assured to act upon such fear, where it is well grounded.

Insurers were held liable for the loss of specie thrown overboard at the time the ship was captured, to prevent its falling into the hands of the enemy.<sup>1</sup> Yet it was thrown over for fear it would come into his hands; and though this was done at the time of the capture, this only proves that the peril was so impending as to justify the assured in acting with reference to it.

They have also been held liable for the loss of a vessel voluntarily burnt to prevent her falling into the hands of the enemy.<sup>2</sup> This was ruled by Lord Ellenborough to be a loss by fire, but this only relates to the manner of declaring in the action, for the insurers certainly could not be liable unless enemies and capture were among the risks insured against.

Jettisons and many other losses that are subjects of general contribution, are often incurred on account of an impending peril that has not at the time begun sensibly to take effect upon the property, as well as on account of what is apprehended from the continuance of a peril that has already begun to operate; yet, if the peril be insured against, the insurers are liable for these losses.

There appears to be reason, therefore, to infer, that the insurers are liable for a loss that may fairly be considered to be exclusively and solely occasioned by a peril insured against, whether the loss prevents, or is concurrent with, or follows, the actual operation of the peril.

Kent, C. J., applies the maxim *quia timet* to a danger too remote to be regarded as the specified peril.<sup>3</sup> This is the only definite, intelligible meaning which I am able to find for the maxim. It seems not to be invariably limited to this sense, but for the present purpose we will consider it to be so limited, without stopping to inquire whether it is always true, even so far. It concerns us to notice it only for the purpose of preventing it from spreading obscurity over our inquiries.

The question, whether interdiction of trade at the port of des-

<sup>1</sup> *Butler v. Wildman*, 3 Barnew. & Estrangin's note; Valin, tit. Insurance, Ald. 398. a. 26.

<sup>2</sup> *Gordon v. Rimmington*, 1 Campb. <sup>3</sup> *Craig v. United Ins. Co.* 6 Johns. 123; Pothier, tit. Insurance, n. 53, and N. Y. 253.



tinuation, interception of the voyage by blockade, and imminent danger of capture or seizure, amount to an arrest, restraint, and detention, for which the insurers are liable, has occurred in different cases in England, and has been elaborately considered in the courts of the United States.

The underwriters on a cargo of pilchards insured from Cornwall to Naples were held in England not to be liable for the loss where the voyage was broken up and the cargo sold at Mahon, where the vessel had put in by order of the commander of the convoy, on account of intelligence that English vessels were excluded from Naples:<sup>1</sup>

Or where the voyage was defeated by the port of destination having fallen into the hands of the enemy after the vessel sailed:<sup>2</sup>

Or where the vessel, being ordered away from Maldonado in the river Plate, the only port of destination named in the policy which was not in the hands of the enemy, met with a loss by perils of the sea in proceeding for Rio de Janeiro, the nearest friendly port:<sup>3</sup>

Or where, on a voyage from Hull to St. Petersburg, the master of a British ship was informed by the commander of the convoy with which he sailed, that British vessels were embargoed in the Russian ports, and therefore returned to England:<sup>4</sup>

Or where, on a voyage by a British vessel from London to Revel, the master, hearing on the passage of the embargo laid on British vessels in Russia, put back, and the vessel was lost while on the course to England:<sup>5</sup>

<sup>1</sup> *Hadkinson v. Robinson*, 3 Bos. & P. 388, per Alvanley, C. J., and his associates, on the ground that the peril of arrest acted not directly, but circuitously, on the subject. This case was approved by the Supreme Court of the United States, as illustrating the doctrine that the underwriters against these perils are not answerable for the risk of the interdiction of trade by the authorities in possession of the port of destination. *Smith v. Universal Ins. Co.* 6 Wheat. 176.

<sup>2</sup> *Lubbock v. Rowcroft*. 5 Esp. 50, per Lord Ellenborough, C. J., on the ground of its being a mere fear of capture.

<sup>3</sup> *Parkin v. Tunno*, 11 East, 22; 2 Campb. 59; on the ground that "the policy could not cover the voyage to Rio, notwithstanding the necessity of it."

<sup>4</sup> *Forster v. Christie*, 11 East, 205, decided on the authority of *Hadkinson v. Robinson*, 3 Bos. & P. 388.

<sup>5</sup> *Blackenhagen v. London Ass. Co.*

Or where, in Massachusetts, under a policy on a cargo from Salem in that State to Malaga, the master, being warned by a British privateer, (1808,) by indorsement of his register, not to proceed to any port except in Great Britain, Gibraltar, or Malta, and was served with a copy of the British Orders in Council, declaring the Continental ports to be in a state of blockade, and advised to return to Salem, accordingly put about, and was captured by another British privateer, while proceeding for Salem, and afterwards rescued his vessel and arrived at that port :<sup>1</sup>

Or where, under a policy on vessel and cargo, on a voyage from Salem to St. Andero in Spain, the master, having a similar notice to that in the preceding case, proceeded to Gibraltar, and relinquished the voyage :<sup>2</sup>

Or where, under a policy upon a cargo of fish from Boston to Leghorn, the master having notice at Gibraltar of the same British orders in Council, and the counter French Decrees, gave up his voyage and sold his cargo there, the same being in a heating state, and about to be spoiled :<sup>3</sup>

Or where, under policies on vessel and cargo from New York to Barcelona or Salon in Spain, with divers special stipulations

1 Campb. 454, per Lord Ellenborough, who said the case would "hardly bear to be stated," as the voyage insured had been abandoned, though his ruling might be otherwise if the intention of the master had been to resume the voyage. The assured in this case, having been nonsuited, brought his action in the Common Pleas, where the ruling by Sir James Mansfield was the same, but the jury found a verdict in favor of the assured, which the court set aside. 1 Campb. 456, n.

<sup>1</sup> Richardson v. Maine F. & Mar. Ins. Co. 6 Mass. 102, per Parsons, C. J., and his associates, that a "fear of a loss was not a peril within the policy," and to admit it would be productive of uncertainty, and open a door to frauds." See remarks upon this case by Brackenridge, J., 5 Binn. Penn. 421.

<sup>2</sup> Cook v. Essex F. & Mar. Ins. Co. 6 Mass. 122, per Parsons, C. J., and his associates, on the ground that though the voyage was lost by a reasonable fear of capture on account of contraband trade had the ship proceeded, which trade was not insured against, and also on the ground that the insurers would not have been liable, if it had been insured against. See also Wheatland v. Gray, 6 Mass. 124.

<sup>3</sup> Amory v. Jones, 6 Mass. 318, per Parsons, C. J., and his associates, on the ground of fear of peril. See also, for similar decisions by the same court on a similar state of facts, Lee v. Gray, 7 Mass. 349; Tucker v. United Mar. & Fire Ins. Co. 12 Mass. 288; in which the judgment is put upon the ground of fear of peril.

respecting abandonment on capture or detention, the master having notice of the British Orders in Council and French Decrees above mentioned, instituting what have been termed "paper blockades," and declaring sweeping interdictions to neutral commerce, and also having notice of an Algerine war upon American commerce, gave up the voyage and returned with his cargo to New York.<sup>1</sup>

It is held by the Supreme Court of the United States that the loss of the voyage through fear of capture, arrest, restraint, or detention, occasioned by false intelligence, is not a risk covered by an insurance against those perils; as where the master of a vessel, on a voyage from Philadelphia to the Isle of France, in 1808, being detained two days, and warned by a British ship of war, by indorsement on the ship's papers, not to proceed to any port of the enemies of Great Britain, and told erroneously that the Isle of France was blockaded and his vessel would be subject to capture if he proceeded thither, thereupon abandoned his voyage and returned to Philadelphia.<sup>2</sup>

There have been, however, divers decisions that the loss of a voyage by its being abandoned on account of the certainty of capture or seizure, upon the vessel's proceeding, or of such extreme probability as to render proceeding upon the voyage egregiously rash and inexcusable, is a loss by arrest, restraint, and detention:<sup>3</sup>

<sup>1</sup> *Craig v. United Ins. Co.* 6 Johns. N. Y. 266, per Kent, C. J., and his associates, on the ground that it did not appear that, under the orders and decrees and interdictions, the vessel or cargo would certainly have been subject to capture or seizure, and condemnation, had the vessel proceeded to Barcelona. This made it a question for the jury. And see *Corp v. United Ins. Co.* 8 Johns. N. Y. 277, for a similar judgment on a like state of facts. In case of intelligence received by an English vessel after the voyage had begun, that Lisbon, the port of destination, had fallen into the hands of the French, then at war with Great Britain, and of the voyage being thereby defeated, it

was adjudged in the English King's Bench, that no freight pro rata was due under a charter-party stipulating for payment of freight on the right delivery of the cargo at Lisbon. *Liddard v Lopes*, 10 East, 526.

<sup>2</sup> *King v. Delaware Ins. Co.* 6 Cranch, 71; 2 Wash. C. C. 300. The ground of the decision was that the voyage was not prohibited by the British orders in council, and that there was not either any physical or legal impediment to the vessel's proceeding.

<sup>3</sup> *Craig v. United Ins. Co.* 6 Johns. N. Y. 226; per Kent, C. J., giving the opinion of the court; and see *Symonds v. United Ins. Co.* 4 Dal. 417.

As where, under a policy made in New York on cargo, on a voyage thence to Sweden or Russia, the master, being off Gothenburg, July, 1812, received intelligence of war between the United States and Great Britain, and considering capture to be certain if he should proceed on his voyage up the Baltic, then swarming with British cruisers, some of which were constantly in sight, renounced the voyage and put into Gothenburg, and there disposed of his cargo :<sup>1</sup>

And where, in another New York case, under a policy on a cargo from New York to Hamburg, the master of the vessel had notice from a British ship of war in the English Channel, that the Elbe was blockaded, which notice was indorsed on the ship's register, and thereupon turned off to Embden as the nearest neutral port to Hamburg, where the consignees, at the latter place, consented to receive the cargo :<sup>2</sup>

And where, in a Pennsylvania case, under a policy on goods from Philadelphia to Antwerp, a guard was put on board of the vessel on its arriving in the Flushing Roads, October, 1807, and the vessel was ordered not to proceed to Antwerp, and the guard remained on board until the master consented to change his destination and proceeded for Rotterdam by advice of his consignees, and was captured by a British ship and sent to the Downs and detained until he had intelligence of the decree of Holland forbidding the entry of vessels which had touched in England, when he relinquished his voyage :<sup>3</sup>

And where, in a Louisiana case, a cargo being insured from New Orleans to Tampico, the vessel was boarded off the latter

<sup>1</sup> *Saltus v. United Ins. Co.* 15 Johns. N. Y. 523, per Thompson, C. J., and Spencer, Van Ness, Yates, and Platt, Justices, upon the ground that it was a restraint by princes or by men-of-war.

<sup>2</sup> *Smidt v. United Ins. Co.* 1 Johns. N. Y. 249 ; Kent, C. J., Thompson, J., and Livingston, J., being in favor of the claim for a total loss, on account of loss of the voyage on the cargo by restraint, citing *Targa*, c. 59, 291 ; *Casar*. Disc. 23, n. 84 ; *Emerigon*, tom. 1, p. 507, c. 12, s. 26, and p. 542, c. 12, s. 31 ; and *Spencer, J., and Tompkins, J., dissent-*

ing, on the ground that there had been no actual operation of any vis major on the insured subject.

<sup>3</sup> *Savage v. Pleasants*, 5 Binn. Penn. 403. Tilghman, C. J., giving the opinion of the court, remarks that, in reference to the decisions against the assured in similar cases, " the assured would be in a hard situation," if he could not recover for a capture if he proceeded, or for a loss of the voyage if he abandoned it. See also remarks of Tilghman, C. J., in *Thompson v. Read*, 12 Serg. & R. Penn. 440.



place by officers from the French blockading squadron, and forbidden to enter, and prevented from entering, and ordered to put back to her port of departure, and thereupon returned thither, the Supreme Court of that State held it to be a total loss by arrest, though neither vessel nor cargo was actually seized or detained.<sup>1</sup>

The cases above referred to evidently present striking discrepancies, and prove the nicety and difficulty of the question under consideration.

One of the questions suggested by these cases relates to the time when the risk ends, in case of the insured voyage being relinquished; in respect to which, I cannot but doubt those cases where it is held that the risk ceases immediately on the vessel's changing its course.<sup>2</sup> These decisions proceed upon the notion, that the risk continues only so long as the voyage continues. But the fairer and truer way of applying this proposition seems to be, to consider the voyage as continuing until the ship and cargo can be extricated from the peril. Where the master steers for another port of destination, or returns to his port of departure merely for the purpose of avoiding the capture or seizure which awaits him inevitably if he proceeds on the original destination, he does not disengage himself from the insured voyage until he arrives at his home port, or the foreign port of necessity which he has selected. No new enterprise is yet projected. He is only adopting what he deems the least hazardous way of bringing the pending voyage to an end. I cannot see how the risk should be terminated by avoiding seizure or capture in such case, any more than by shunning a rock or shoal. I accordingly state as what seems to me to be the better doctrine on this subject, that,

*In case of the master justifiably turning off to another port of discharge, or to his port of departure, merely to avoid certain capture at that of the original destination, the risk continues on the ship, cargo, or freight, until arrival at such port.*

The risk must terminate at such port on all the interests. There may, in the mean time, have been partial losses on either interest. In respect to the ship, if it arrives in a navigable state,

<sup>1</sup> *Vigers v. Ocean Ins. Co.* 12 La. 259; *Blackenhagen v. London Ass. Co.* 367. 1 id. 454; *Richardson v. Maine Ins. Co.*

<sup>2</sup> *Lubbock v. Rowcroft*, 5 Esp. 50; 6 Mass. 102; *Cook v. Essex Ins. Co.* id. *Parkin v. Tunno*, 11 East, 22; 2 Campb. 122.

without damage, over half of its value, there has been no total loss. In respect of the freight, there may have been a partial or total loss, or no loss at all, according to the contract on which that interest depends. The result in respect to the cargo may be different from that in respect to the other interests, as will appear in the chapter on total loss and abandonment, for the reason that a right of abandonment may accrue in respect of this interest where, on the same voyage, it does not accrue in respect of the others.

Another question arising on the jurisprudence above recapitulated is, whether there is any distinction between a voyage being broken up by a blockade and its being broken up by an interdiction by the authorities in command at the port of destination. In all the cases referred to except one,<sup>1</sup> these different ways of the voyage being defeated are spoken of as being equivalent to each other. In that case an interdiction by the authorities at the port of destination is adjudged not to be at the risk of the insurers, so far as the perils insured against are concerned, though the being shut up in a bay or port by a blockade is considered to be covered by the policy against restraints.

That distinction suggests still another question, namely, whether there is any difference between being hindered by a blockade from leaving a port, or river, or bay, or a continent, according to the extent of the real or pretended blockade, and the being hindered from entering or coming within such limit. And on this question I cannot, to our present purpose, perceive any ground of distinction of the two cases of passing a belligerent or hostile squadron or fort, whether the vessel is going one way or the other. Whether it might make a difference in respect to the right of abandonment in any given case, is not material to our present inquiry, for though it should be considered to be at the risk of the insurer in each case, still the consequence as to the right of abandonment might not necessarily be the same in both. We will then consider the responsibility of the insurer to be the same in both cases.

Emerigon is a grave authority on the present question, being one of general principles, and the same under different jurisdictions. He mentions the case of an English vessel being pre-

<sup>1</sup> *Smith v. Universal Ins. Co.* 6 Wheat. 176.

vented from entering Leghorn, its port of destination, on account of a Dutch squadron, then hostile, being at that port, and the master's going to Naples and discharging his cargo there. The entire freight was awarded to the master by the English consul and two adjudicators associated with him.<sup>1</sup> This decision is approved by Emerigon, and a similar one made by himself and his associated arbitrators, with the qualification that freight is to be allowed *pro rata itineris peracti*. In other words, the contract for the voyage is to subsist and be in force until arrival at the port of necessity.

Mr. C. J. Tilghman intimates an opinion, obiter, that the defeat of a voyage by blockade, "where the danger is so great as to amount almost to certainty of capture," is, or should be, a peril covered as an "arrest" or "restraint."<sup>2</sup>

The adjudications, in the English and American cases last above recapitulated, are to the same effect, and I venture to state it as the better doctrine, that,

*Where, after the risk has begun, the voyage is inevitably defeated by blockade, or interdiction at the port of departure, or destination, or by a hostile fleet being in the way, rendering the proceeding upon it utterly impracticable, or capture or seizure so extremely probable that proceeding would be inexcusable, the risk continues till the vessel has arrived at another port of discharge adopted instead of that originally intended; and also, that an assured on the cargo has a right to abandon.*<sup>3</sup>

1116. *In insurance against "unlawful arrests, restraints, and detainments," the qualification "unlawful" applies to "restraints" and "detainments" no less than to "arrests."*<sup>4</sup>

It was held by the Supreme Court of the United States under this clause, that a British blockading squadron's preventing a neutral vessel from coming out of Chesapeake Bay was not authorized by the law of nations, and so was an "unlawful" restraint.<sup>5</sup>

<sup>1</sup> Emerigon, tom. 1, p. 557, c. 12, s. 34.

<sup>2</sup> *Thompson v. Read*, 12 Serg. & R. Penn. App. 440.

<sup>3</sup> See Emerigon, tom. 1, c. 12, s. 31.

<sup>4</sup> *M'Call v. Marine Ins. Co.* 8 Cranch, 59.

<sup>5</sup> *Olivera v. Union Ins. Co.* 3 Wheat. 183. See also *Thompson v. Read*, 12 Serg. & R. Penn. App. 440, as to what is a "lawful" restraint by blockade.

SECTION XI. RISKS FROM PROHIBITED AND CONTRABAND TRADE.

1117. *Under the common form of the policy, without any exception of the risk of trade, illicit or prohibited by foreign laws, the insurers are liable for losses in consequence of violations of the trade laws of foreign states, if they were apprised of the intention to violate such laws, either by anything contained in the policy, or by the known laws of the place to which the vessel is destined, or the known usages of the trade.*<sup>1</sup>

Where it is notorious that the trade is prohibited at the foreign port of destination, the risk of seizure and condemnation for a contravention of the prohibition is covered by the policy:<sup>2</sup>

Although the insurance on goods is with a warranty "against prohibited trade," yet, if one of the articles named in the policy is well known to be prohibited at the specified port of destination, the risk of seizure for contravention of the prohibition has been held by Mr. Justice Washington to be assumed by the insurers. In case of an insurance on "goods or specie from New York to Curaçoa, Nevitas, Matanzas," and back, "warranted against prohibited trade," the specie on board at Matanzas was seized there, the exportation of this article from that port being well known to be prohibited. He ruled that the insurers were liable for the loss.<sup>3</sup>

If particular importations are admitted under special restrictions, the underwriter is not presumed to have notice that a prohibited trade is to be covered by the policy:<sup>4</sup>

And so, also, if trade is sometimes permitted and at others prohibited.<sup>5</sup>

<sup>1</sup> 1 Emerigon, 684, c. 12, s. 51; Valin, tom. 2, p. 131, Insurance, a. 49; Archibald v. Mercantile Ins. Co. 3 Pick. Mass. 70; Richardson v. Maine Ins. Co. 6 Mass. 102; Andrews v. Essex Ins. Co. 3 Mas. C. C. 6; and see 2 Duer, Mar. Ins. 619 Lect. 13, Part II. s. 1, sub-s. 38; Pollock v. Babcock, 6 Mass. 234; Lever v. Fletcher, Park, Ins. 8th ed. 507; Kohne v. Ins. Co. of North America, 1 Wash. C. C. 158; Livingston v. Mary-

land Ins. Co. 7 Cranch, 506; and see supra, c. 7, s. 9.

<sup>2</sup> Parker v. Jones, 3 Mass. 173; Blagge v. N. Y. Ins. Co. 1 Caines, N. Y. 549; Archibald v. Mercantile Ins. Co. 3 Pick. Mass. 70.

<sup>3</sup> Seton v. Delaware Ins. Co. 2 Wash. C. C. 175.

<sup>4</sup> Parker v. Jones, 13 Mass. 173.

<sup>5</sup> Blagge v. N. Y. Ins. Co. 1 Caines, N. Y. 549.



A cargo being insured from Boston to St. Pierre and Miquelon, with liberty to proceed to St. John's, in Newfoundland, the goods were seized at St. John's, because the importation was not directly from the United States, the vessel having first visited another British colonial port. The insurers were held in Massachusetts, by Parker, C. J., and his associates, not to be liable.<sup>1</sup>

1118. *Where a loss is occasioned by the infringement of a foreign regulation, without any fault of the assured or his agents, and which could not have been foreseen or prevented, the insurers are answerable; this, like other inevitable losses in general, is at their risk.*

This was determined in a case upon a policy on a vessel "from Newburyport to every port or place to which she might proceed (excepting the West Indies) during the term of twelve months; it being understood that the insurers were not liable for any loss or expense arising from the violation of the existing laws or regulations of any of the belligerent powers restricting neutral commerce." The vessel sailed for Amsterdam, and was captured on the voyage by a British privateer and sent into Bristol, whence, after being released, she sailed for Amsterdam, and arriving off the Texel was captured by a French privateer as she was about taking a pilot on board to go up to Amsterdam. The vessel was libelled for having sailed for Holland after having been carried into England, which was a violation of the Milan Decree, at that time in force in Holland, but of which, it being then recent, the captain had no knowledge. The decree had been published subsequently to the date of the policy. The court decided, that the exception as to "loss and expense arising from existing regulations of the belligerent powers" extended only to regulations existing at the time of making the policy, and accordingly did not exempt the underwriters from the risk under the Milan Decree, and that the insurers were answerable for the loss.<sup>2</sup>

A cargo being insured from Boston to Rio Janeiro, the vessel, in the course of the voyage, put into some port on the coast of Brazil for supplies, where she was seized, and being carried to Pernambuco was condemned, together with her cargo, on the ground of her having been destined to Rio Janeiro, with the

<sup>1</sup> Archibald v. Mercantile Ins. Co. 3 Pick. Mass. 70.

<sup>2</sup> Wood v. New England Mar Ins. Co. 14 Mass. 31.

intention of trading there in violation of the Portuguese laws. It was generally known in the United States that all trade by Americans, at Rio Janeiro, was prohibited by the laws of Portugal; though American vessels frequently cleared for that port, for the purpose of illicit trade.

Mr. Justice Sedgwick, giving the opinion of the court, said: "A capture for illicit trade is not insured against, unless the risk be expressly or impliedly assumed." But the court seemed to be of opinion that it was assumed in this case, and held that the insurers were liable for the loss.<sup>1</sup>

1119. Insurance expressly made against the risk of the contravention of foreign trade laws is valid.<sup>2</sup>

1120. Trade in violation of foreign laws is sometimes called contraband; and so also is trade carried on in violation of the laws of the country of which the parties are subjects. *Contraband trade most frequently signifies that of a neutral to a belligerent country, in arms or military stores, or his trade in any articles to a blockaded port, or besieged town, of one of the parties at war.* These are the two kinds of trade which we are at present considering under the name of contraband.<sup>3</sup>

1121. The risk arising from the contraband character of the goods stands upon the same ground with that arising from prohibited trade. The circumstance of the goods being contraband may expose them, and also the ship, to seizure and detention.

*But if the underwriter has not notice of the risk of contraband, though he insures against seizure and detention generally, he is not liable for seizure or detention for this cause, though the policy remains valid in respect of other risks.*<sup>4</sup>

1122. *If the underwriter has notice of the contraband character of the trade, he is liable for this risk.*

The liability of the underwriter for the risk arising from the contraband character of the goods, depends upon the same circumstances as his liability for the risk occasioned by violating foreign

<sup>1</sup> Pollock v. Babcock, 6 Mass. 234.

<sup>2</sup> Richardson v. Maine Ins. Co. 6 Mass. 102; and see c. 10, No. 908, 910.

<sup>3</sup> Interloping trade in contravention of the commercial regulations of foreign states is sometimes denominated contra-

band. Pothier, Ins. n. 58; Richardson v. Maine Ins. Co. 6 Mass. 112. And so also trade in violation of law. Us et Cout. de la Mer, Part III. a. 6, n.; Marsh. Ins. 78.

<sup>4</sup> Per Parsons, C. J., Richardson v. Maine Ins. Co. 6 Mass. 102.

trade laws. If it appears from the description of the goods insured, or any provision in the policy, or from the circumstances under which the voyage is commenced, that the risk arising from the contraband character of the property insured is one of those contemplated by the parties as the subject of indemnity, the insurers will be answerable for losses on this account.

Insurance was made on goods for a voyage from New York to Havana. The goods insured were not particularly described in the policy, nor was any representation made to the insurers as to the kind of goods. The sum of sixteen thousand dollars was insured generally "on the cargo, not warranted." The condition that the goods were "not warranted," seemed to imply that the insurers were to assume some risk as to their character, and this risk, whatever it was, seemed to relate to their character as contraband, for the goods were represented to be the property of particular persons, and it must accordingly have been known whether they were neutral or not. The cargo consisted of articles the importation of which at Havana had been declared, by a proclamation of the governor, to be permitted. It was held by the Supreme Court in New York, that the insurers were liable for the seizure of the goods on account of the importation being in alleged contravention of law.<sup>1</sup>

The judges who gave opinions in the case just referred to assumed, very distinctly, that, if the insurer is informed by the policy, or otherwise, what kind of goods he insures, he takes the risk of their being seized and condemned as contraband, unless this risk is unnecessarily incurred or enhanced by the fault of the assured, or of those for whose conduct he is answerable.

This doctrine was subsequently recognized by the same court,<sup>2</sup> and was adopted and confirmed by the Court of Errors in the same State.<sup>3</sup> It is a consequence of this doctrine distinctly acknowledged in the cases just referred to, that, if it appears by the policy or otherwise, that the insurer waives being informed of the kind of goods insured, and so waives the right of taking any exception on this account, he assumes the risk arising from their being considered contraband ; it being understood, no doubt,

<sup>1</sup> *Seton v. Low*, 1 Johns. Cas. N. Y. 1.      <sup>3</sup> *Rhineland v. Juhel*, 2 Johns. Cas.

<sup>2</sup> *Skidmore v. Desdoity*, 2 Johns. Cas. N. Y. 487.  
N. Y. 77 ; *Juhel v. Rhineland*, id. 120.

that the loss on account of contraband is not occasioned by the fault of the assured.

The courts in Massachusetts and New York have assumed that neutrals may lawfully trade to a blockaded port, or supply either belligerent with munitions of war. Some doubt has been expressed respecting this doctrine; but admitting it to be correct, the only question, in determining whether the insurer is answerable for the risk on account of contraband, is, whether he was informed by the policy, or by express representations, or is to be presumed to know in any other way, what kind of goods were insured, or any circumstances in the knowledge also of the assured, which might expose the property to detention or seizure as contraband of war. This makes it a question of representation in one sense; that is, if the insurers have no ground to object, on account of the concealment or misrepresentation of facts, they assume the risk arising from contraband, so far as it is not necessarily superinduced by the assured. But according to Chief Justice Parsons's view of this subject, taken in connection with the doctrine adopted in New York, it is not, in the ordinary sense, a question of representation and concealment; for he says that the policy is not void, but that the risk of contraband remains with the assured. And this seems to be the better doctrine in the absence of all fraud, as has previously been suggested.<sup>1</sup>

As the insurers are held to assume the risk arising from the circumstance of the goods being in fact contraband, provided there is no misrepresentation, or concealment, or other fault of the assured, there is still stronger reason why they should be answerable for losses by the seizure of the property as contraband, when it is really not so. Accordingly, in case of the condemnation of property for a violation of a blockade, when there was in fact no legal existing blockade, the insurers were held to be liable for the loss.<sup>2</sup>

1123. A ship which carries articles contraband of war, under false papers and a false destination, is held to be liable, together with her cargo on board, to seizure and condemnation by a belligerent, after having delivered the contraband articles, being yet

<sup>1</sup> *Supra*, No. 978.

<sup>2</sup> *Sawyer v. Maine F. & Mar. Ins. Co.* 12 Mass. 291.



on the same adventure, whether outward or homeward, and whether the cargo on board at the time of the capture be or be not the proceeds of the contraband articles ;<sup>1</sup> therefore,

*Underwriters on the ship and freight are not liable for loss by seizure for carrying contraband goods in disguise, unless their consent is shown to the disguise, and they agree to be answerable notwithstanding.*

1124. *If war is declared after the risk has begun, the underwriters are liable for the risk of capture or seizure for contraband trade until the assured or his agents have notice of the war, and are in fault in still prosecuting the voyage afterwards. In other words, as before said,<sup>2</sup> the insurer is liable for the enhancement of the perils insured against, without the fault of the assured, after the risk has once begun.*

#### SECTION XII. OTHER PERILS. GENERAL CLAUSE.

1125. The preceding risks are specifically enumerated in the common form of the policy. Although the indemnity thus stipulated is very comprehensive, the parties in some instances enumerate *other particular risks*, or specify the kind of damage arising from the usual risks for which indemnity shall be made.

Insurance was made in England on the expenses of a voyage, or in effect upon the freight, with a stipulation, "that, if the ship should not load a cargo at Riga by the act of the Russian government, the assured were to receive a total loss."<sup>3</sup>

A license of trade from the enemy was insured, in Massachusetts, among other risks, "against its being destroyed or rendered useless by the ordinary perils of the seas, fire, or otherwise," and it was rendered useless by being indorsed by a British officer, who, in the course of the voyage, boarded the vessel on board of which it was insured; and this was held to be a loss within the policy.<sup>4</sup>

1126. *The general clause against all other risks and perils covers other perils of a like kind to those specified.*

<sup>1</sup> Carrington v. Merchants' Ins. Co.

<sup>3</sup> Bell v. Bell, 2 Campb. 475.

8 Pet. 495.

<sup>4</sup> Perkins v. New England Mar. Ins.

<sup>2</sup> Supra, s. 6.

Co. 12 Mass. 214.

After the enumeration of the particular risks, the policy usually contains a general clause, by which the subject is insured against "all other perils, losses, and misfortunes which shall come to the hurt, detriment, or damage of the said goods, or ship, &c., or any part thereof." This is the old form of the clause which is now used in the greater number of policies; but in some, the expression is, "all other losses, &c., for which the insurers are liable, according to the rules and customs of insurance," in the place where the policy is made; others say, "all other losses, &c., for which the insurers are legally accountable."

Lord Ellenborough says: "The general words, 'all other perils, losses, and misfortunes,' &c., have not yet been the immediate subject of any judicial construction in our courts of law. As they must, however, be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending reasonable indemnity to many cases not distinctly covered by the special words; they are entitled to be considered as material and operative words, and to have their due effect assigned to them in the construction of this instrument; and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those specially enumerated and occasioned by similar causes."<sup>1</sup>

In case of dollars being thrown overboard, to prevent their falling into the hands of the enemy, when the ship was captured, the judges thought the insurers liable under this general clause, as capture was one of the enumerated perils, and this loss was incidental to it, or ejusdem generis.<sup>2</sup>

Damage by being fired into through mistake was brought under the same clause, as being ejusdem generis with the perils of the seas.<sup>3</sup>

A ship being insured for twelve months "at sea and in port," during that time, at the harbor of St. John's, in New Brunswick, was in consequence of the violence of the winds blown over on her side while in a graving-dock, and thereby bilged. It was

<sup>1</sup> Cullen v. Butler, 5 Maule & S. 461; and see Emerigon, c. 12, s. 1 and 2.

<sup>3</sup> Cullen v. Butler, Park, Ins. 105; cited 3 Barnew. & Ald. 403; 5 Maule

<sup>2</sup> Butler v. Wildman, 3 Barnew. & S. 461; 1 Stark. 138. Ald. 398.

held that the underwriters were liable, this being a peril ejusdem generis with those enumerated in the policy.<sup>1</sup> A similar decision was given in case of a ship being blown over on her side while hauling up on a marine railway, being still partly waterborne.<sup>2</sup>

Under an insurance declared in the policy to be "upon the freight bill" of a steamboat, it was held in Missouri to be an insurance that the vessel should be in a condition to earn freight.<sup>3</sup>

A loss on a steamboat by collision, through fault of the master and mariners of another boat, was held in Louisiana to be covered under the clause "all other losses according to the general laws of insurance,"<sup>4</sup> though it seems that it would be so under "perils of the river," usually inserted in the policies on the trade in the Mississippi and Ohio.

Where the written part of the policy contained a clause by which the insurance was declared to be "against all risks," the court in New York said: "This expression is vague and indefinite, but if we allow it any force it must be considered as erecting a special insurance and extending to other risks than are usually contemplated. We are inclined to apply it to all losses except such as arise from the fraud of the assured."<sup>5</sup>

Taking the whole policy, in the common form, together, then, and construing the clause in question in connection with, and in reference to the other parts, it is understood to cover merely perils similar to those specified, although they may not come precisely within them; for if any narrower construction is given, and the clause is considered to apply only to perils of the same kind, this is in effect, obliterating the clause.

But where the clause is in the written part, which has a paramount force, as we have seen, the fair construction seems to be nothing short of that adopted in New York; namely, all perils that can be legally covered.

<sup>1</sup> Phillips v. Barber, 5 Barnew. & Ald. 161.

<sup>2</sup> Ellery v. New England Ins. Co. 8 Pick. Mass. 14.

<sup>3</sup> Field v. Citizens' Ins. Co. 11 Mo. 50.

<sup>4</sup> Caldwell v. St. Louis Perpetual Ins. Co. 1 La. Ann. 85.

<sup>5</sup> Goix v. Knox, 1 Johns. Cas. N. Y. 337. See also Skidmore v. Desdoity, 2 id. 77.

## SECTION XIII. LOSS FROM FEAR OF PERILS.

1127. The subject of this section has been considered in a preceding one,<sup>1</sup> and it is not proposed to go into the investigation of it again, or to recapitulate the cases here, but merely to present it in a manner more marked and conspicuous. The use of the term "quia timet" has, it seems to me, served merely to introduce the erroneous notion, that insurers are not liable for losses and sacrifices incurred, and risks run, justifiably, through fear of an imminently impending peril, or one inevitably awaiting the subject in the remote stages of the voyage insured, which notion seems to be plainly contradictory to established and habitual jurisprudence, and inconsistent with the fundamental principles and leading purpose of insurance, and contrary to expediency and equity.

## SECTION XIV. REMOTE AND CONSEQUENTIAL LOSSES. CONCURRENCE OF DIFFERENT PERILS. LOSS UPON ONE SUBJECT BY DAMAGE TO ANOTHER.

1128. *It is necessary to discriminate what losses are included under any particular peril in all forms of policies*, since some perils are left at the risk of the assured in every policy, as we have seen, and the same party is not unfrequently insured by different companies against the different risks on the same subject, as against capture by one, and against sea perils by another.

So, also, where successive policies are made, the question sometimes arises whether a loss is under the prior or subsequent policy.

So, a discrimination is to be made of the risks to be run, by the respective parties to the policy, in case of the exception of risks for a certain time, or in a certain locality.

1129. *A peril includes its direct effects or results, as contradistinguished from those that are remote, or merely collateral or incidental.*

The loss of the amount advanced for shipping coolies from

<sup>1</sup> See *supra*, No. 1115, and *infra*, No. 1115.



China to Peru, by their mutinying and running away with the ship, was held to be a direct effect of the piracy.<sup>1</sup>

Thus, where, by the terms of a policy on slaves, the insurers were liable for "mortality by mutiny," and some of the slaves were killed at the time of a mutiny by being fired upon, others afterwards died of their wounds, and others chose a voluntary death by fasting, or died through despair, and the sale of the survivors was injured, and the price of them reduced, by the circumstance of the mutiny having taken place, Lord Mansfield instructed the jury that the underwriter was liable for the loss of those killed during the mutiny, and also of those who afterwards died in consequence of their wounds; but he said, "I think the underwriter is not answerable for the loss of the market,—that is a remote consequence;" and he was of opinion, also, that the underwriter was not answerable for the loss of such as died by fasting, or through despair.<sup>2</sup>

So, where a voyage was unusually prolonged by bad weather and contrary winds, and thereby the ship came to be short of water and provisions, and on this account a part of the slaves were thrown overboard, this was held not to be a loss by perils of the seas, for the loss was not a direct consequence of those perils,<sup>3</sup> but arose from the insufficiency of the supply of water, and this supply, with all the consequences of any deficiency, was a matter belonging wholly to the assured, though the voyage should be protracted.

Insurers are not liable for mould or discoloration of goods by mere dampness, without any contact with salt water, or any extraordinary degree of any peril insured against.<sup>4</sup>

But they are liable where a part of the cargo is damaged by actual contact with the water and another part by contact with that so damaged.<sup>5</sup>

The enhanced expense of the repairs of damage by perils insured against, occasioned by the necessity of repairing at a port

<sup>1</sup> *Naylor v. Palmer*, 8 Exch. 739; 22 Eng. L. & Eq. 573.

<sup>3</sup> *Tatham v. Hodgson*, 6 Term, 656.

<sup>4</sup> *Baker v. Manufacturers' Ins. Co.*

<sup>2</sup> *Jones v. Schmoll*, Park, Ins. 97; 1 Term, 130, n. See also 2 Valin, tit.

<sup>12</sup> *Gray*, Mass. 603.

Ins. a. 11, 15; Emerigon, c. 12, s. 10; Poth. tit. Ins. No. 66, Estrangin's note.

<sup>5</sup> *Woodruff v. Commercial Ins. Co.*  
<sup>2</sup> *Hilt*. N. Y. 122.

not the most economical for the purpose, is at the risk<sup>\*</sup> of the underwriter;

So it is if the master, without any fault of the owner, can raise the requisite funds only on disadvantageous terms;<sup>1</sup>

And so is plunder on shore after shipwreck, as a direct consequence of the shipwreck;<sup>2</sup>

Damage to goods insured against fire by being wetted in extinguishing the fire;<sup>3</sup>

Plunder of goods insured against fire, on their being removed to save them from being burnt, and being thus put out of the control of the assured;<sup>4</sup>

Expense and damages by removing goods insured against fire, to save them from being burnt;<sup>5</sup>

And so is the expense of getting a stranded ship afloat;<sup>6</sup>

And so is the aggravation of a loss by fault of the underwriter, as by neglect of the reinsurer, on notice of a claim upon the original insurer, to consent to the payment of loss, without the expense of contesting it, in a case where, without such consent, the original insurer is justified in contesting the claim;<sup>7</sup>

And so is the aggravation of a subsequent peril by the effects of a previous one, as the subsequent loss of the boat from the stern-davits in consequence of a ship being crippled in a storm.<sup>8</sup>

Where a ship and cargo insured from the United States to Great Britain were detained at the port of departure by an embargo, before the expiration of which war was declared against Great Britain, it was held that the underwriters were not liable for a total loss, as "the declaration of war was in no sense a consequence of the embargo."<sup>9</sup> And the policy did not cover the risk of the loss of the voyage on the cargo by the declaration of war, independently of the intervention of a peril expressly insured against.

<sup>1</sup> *Furneau v. Bradley*, Park, Ins. 257; *Patrick v. Commercial Ins. Co.* 11 Johns. N. Y. 9; *Peters v. Phoenix Ins. Co.* 3 Serg. & R. Penn. 25, and cases passim.

<sup>2</sup> *Bondret v. Hentigg*, 1 Holt, 149; *Stevens*, Average, 155; *Pothier*, Ins. n. 55; and see supra, No. 1107.

<sup>3</sup> Supra, No. 1098 a.

<sup>4</sup> Supra, No. 1098 a.

<sup>5</sup> Supra, No. 1098, 1098 a.

<sup>6</sup> 1 Magens, p. 76, s. 64; *Dix v. Union Ins. Co.* 23 Mo. 57.

<sup>7</sup> *Hastie v. De Peyster*, 3 Caines, N. Y. 190. See also *Savage v. Corn Exchange Ins. Co.* 4 Bosw. N. Y. 1.

<sup>8</sup> *Per Story, J.*, *Potter v. Ocean Ins. Co.* 3 Sumn. C. C. 27.

<sup>9</sup> *Delano v. Bedford Mar. Ins. Co.* 10 Mass. 347.

A cargo being insured from New York to Havre de Grace, the ship was arrested and carried into England, where she was detained till after the port of Havre was declared by the English government to be in a state of blockade. After the declaration of blockade, the ship and the goods insured were released, but the ship could not proceed to the port of destination on account of the blockade. The court said that the assured, to entitle himself to recover for a total loss, must show "that a loss of the voyage was occasioned by the detention;" and they were of opinion, that "the impossibility of prosecuting the voyage, which arose during, and in consequence of, the detention, might be properly considered a loss of the voyage."<sup>1</sup>

Under a policy on goods from Philadelphia to Antwerp, the ship was captured by a British privateer and carried into Plymouth, but was soon released and permitted to proceed; she was however prohibited entry at Antwerp, on account of having been thus detained by a British vessel and carried into Plymouth. Chief Justice Tilghman and Brackenridge, J., were of opinion, upon the authority of the above case, that the loss of the voyage — that is, the prohibition of entry at Antwerp — was a direct consequence of the capture and detention, which were insured against.<sup>2</sup>

In the two last cases, the loss was by foreign interposition, which did not render the voyage illegal; in the preceding one, it was rendered illegal.

A vessel being insured free from capture, underwriters are not liable for loss by its being burnt by the captors.<sup>3</sup>

Insurance of a building against damage by fire does not cover a loss by interruption of business while it is being repaired.<sup>4</sup>

If, after a storm has subsided, the boat is lost by reason of the disabled state of the ship in consequence of damage done during the storm, it is a loss by the storm.<sup>5</sup>

<sup>1</sup> *Barker v. Blakes*, 9 East, 233.

<sup>2</sup> *Savage v. Pleasants*, 5 Binn. Penn. 403.

<sup>3</sup> *Dole v. New England Ins. Co.*; *Same v. Equitable Ins. Co.* 6 All. Mass. 373.

<sup>4</sup> *Niblo v. North American Fire Ins. Co.* 1 Sandf. N. Y. 551.

<sup>5</sup> *Potter v. Ocean Ins. Co.* 3 Sumn. C. C. 27. In this case Mr. Justice Story remarks that the rule, *Causa proxima spectatur*, does not apply; to which it may be added, that the case shows the fallaciousness of that rule.

All salvage expenses consequent on the operation of a peril insured against are covered.<sup>1</sup>

A ship being wrecked at the Isle of France, the consul there, through mistake of the law, paid the crew extra wages for three months. Parker, C. J., and his associates, held that the insurers were not liable for this item of loss.<sup>2</sup>

In case of a vessel having some slaves on board being wrecked on a foreign coast, in consequence whereof they were set at liberty on habeas corpus, the insurers of them in South Carolina were held liable for the loss.<sup>3</sup>

The expense of supporting emigrants while detained is not covered by insurance of passage money.<sup>4</sup>

1130. Whether the insurers are liable for a loss in case of the cause, being a peril insured against, occurring within the period of the risk, and its effect occurring after the expiration of that period, is subsequently considered.<sup>5</sup>

1131. *Insurance against or an exception of a peril may, besides the consequences immediately following it, include also a loss or expense arising on account of it, although what is insured against or excepted does not actually occur, provided the peril insured against or excepted is the efficient acting or imminent cause or occasion of the loss or expense.*

Thus, a policy "free from loss by illicit trade with the Spaniards," has been held to except legal "seizures to prevent illicit traffic, as well as seizures to punish it."<sup>6</sup>

1132. The commonplace maxim, that, in cases of doubt to which of two or more perils a loss is to be assigned, *Causa proxima non remota spectatur*, has been not unfrequently resorted to, by which was meant, originally at least, that a loss is to be attributed to the peril in activity at the time of the ultimate catastrophe, when the loss is consummated.<sup>7</sup> But much of the jurisprudence is contradictory to the maxim taken in this sense, and it

<sup>1</sup> Cox v. May, 4 Maule & S. 152.

<sup>5</sup> See *infra*, s. 15.

<sup>2</sup> Dodge v. Union Mar. Ins. Co. 17 Mass. 471.

<sup>6</sup> Higginson v. Pomeroy, 11 Mass. 104.

<sup>3</sup> Simpson v. Charleston Fire & Mar. Ins. Co. Dudl. So. C. 239.

<sup>7</sup> See *supra*, No. 1097, 1098, 1098 a, and cases there cited. See also Savage v. Corn Exchange Ins. Co. 4 Bosw. N. Y. 1.

<sup>4</sup> Willis v. Cooke, 5 Ell. & B. 641; 33 Eng. L. & Eq. 63.



seems to have served rather to divert attention from the proper inquiry, and to becloud instead of elucidating the subject.

I understand the result of the jurisprudence to be, that,

*In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or is not in activity at the consummation of the disaster.*<sup>1</sup>

1133. *The cases of concurring perils, where all are insured against, do not come within our present inquiry,* the question in such cases being the technical one in declaring for the loss.

1134. In every insurance, the risk on each peril is liable to be affected by every other peril; and *the party, whether insurer or assured, at whose risk a peril is, must bear the loss by such peril though it may have been indirectly and incidentally enhanced by another, for which he is not answerable,* where there is no express or implied stipulation, obligation, or condition against the subject being exposed to such other peril; but where the loss is by a risk insured against that is enhanced by a peril to which the subject is exposed in violation of the express or implied stipulations of the parties, the underwriter is not liable for it.

This principle is to be borne in mind in discriminating between the losses by different perils, and between the direct and remote consequences of a peril.

Thus, under a policy in the ordinary form, the assured must bear the loss arising from the qualities of the article insured, without any direct action of the perils insured against, as those of the sea or others, upon the specific subject of the contract. Accordingly, where a vessel was compelled by sea-damage to put into Martinique to repair, for which purpose it was necessary to discharge the cargo, a part of which consisted of porter and claret, which were liable to be spoiled by the heat of the climate, were necessarily sold. The loss was held not to be such a consequence of the perils of the seas, by which the vessel had been damaged, as to render the insurers of these articles liable for this loss.<sup>2</sup> The loss arose from the action of the climate on the arti-

<sup>1</sup> *Thompson v. Hopper*, 1 Ell. B. & E. 1038; 6 Ell. & B. 937; 38 Eng. L. & Eq. 39; *Tudor v. New England Ins. Co.* 12 Cush. Mass. 554.

<sup>2</sup> *Goold v. Shaw*, 1 Johns. Cas. N. Y. 293; 2 id. 442.

cles, and as this was a damage at the risk of the assured, he was not the less liable for it because it had been indirectly and incidentally aggravated by the delay occasioned by the perils of the seas which were insured against.

So, in case of a vessel putting in at Cadiz for repairs, and being there delayed on account of an epidemic, and loss thereupon ensued; as "the pestilence formed a sound excuse for delay at Cadiz," the underwriter was held to be answerable for the subsequent loss there by the perils insured against, though but for such delay the subject would not have been exposed to such loss.<sup>1</sup>

1135. *The effect of a loss of one subject is a loss on another in divers cases.*

As a total loss of the ship, by its being rendered innavigable in an intermediate stage of the voyage, is a total loss of the cargo and freight by the loss of the voyage, where there are no means of forwarding the cargo to the port of destination, as we shall see in the chapter upon total loss and abandonment.

The underwriters on the ship are not liable for its expenses by delay for the purpose of claiming the cargo in case of capture.<sup>2</sup>

1136. *In case of the concurrence of two causes of loss, one at the risk of the assured and the other insured against, or one insured against by A and the other by B, if the damage by the perils respectively can be discriminated, each party must bear his proportion.*

This proposition seems to be too obvious to need authority or comment, but a different rule was acted upon by Lord Ellenborough, C. J., and Grose, Le Blanc, and Bayley, Justices, in case of a policy upon a ship from New York to London, in 1809, "free from American condemnation," the voyage being intended as an evasion of the American embargo. The ship, having been prevented from escaping by running upon the rocks in attempting to go out of the harbor of New York during the night, was there-

<sup>1</sup> Williams v. Smith, 2 Caines, N. Y. 13. Mr. Justice Kent is reported to have said, "The damage resulting from the delay at Cadiz is covered by the policy," meaning, of course, the damage thus incidentally and remotely occa-

sioned by the delay, but directly by the perils insured against.

<sup>2</sup> Bradford v. Levy, 1 Ry. & M. 331; and see Baillie v. Moudigliani, Park, Ins. 90; Marshall, Ins. 2d ed. 728.

upon seized on the following day, and subsequently condemned for a violation of the embargo. The question was, whether the London underwriters were liable for the loss by the sea-damage. It was held that they were not so. Lord Ellenborough, repeating the maxim, *Causa proxima spectatur*, remarked, in giving the opinion of the court, that "it seemed to be useless to be seeking about for odds and ends of previous and partial losses which might have happened in the course of the voyage, when there was one overwhelming cause of loss which swallowed up the whole subject-matter."<sup>1</sup>

This decision is surely wrong, as implied by another eminent English judge.<sup>2</sup> And it has been the precedent for another in Massachusetts, no less subject to objection; where, under a policy upon the ship and cargo exempt from capture, after jettison of a third part of the cargo in a storm, the vessel, having been damaged by the perils of the seas to three fourths of its value, and so as not to be worth repairing, was captured. The underwriters were held to be liable for the part of the cargo jettisoned, but not for the damage to the ship; the court remarking, that they had not come to this conclusion "without much hesitation, because technical rules only seemed to prevent the assured from recovering."<sup>3</sup> By "technical rules" the court refers to the case above referred to, decided by the English Court of K. B.<sup>4</sup> which seems rather to need support than to suffice for the support of another.

In case of injury to a steamboat by striking the sunken wreck of another in the Mississippi, and subsequent stranding and total

<sup>1</sup> *Livie v. Janson*, 12 East, 648.

<sup>2</sup> Best, C. J., speaking of *Livie v. Janson*, says: "In that case, perhaps, the facts would have warranted the statement of a total loss." *Hahn v. Corbett*, 2 Bingh. 205; and see *Coit v. Smith*, 3 Johns. Cas. N. Y. 16; and *Lawrence v. Aberdein*, 5 Barnew. & Ald. 107.

<sup>3</sup> *Rice v. Homer*, 12 Mass. 230.

<sup>4</sup> *Livie v. Janson*, 12 East, 648; *Green v. Elmslie, Peake*, 212, is also referred to, where, under a policy against

capture only, the vessel being blown to the coast of France and there captured, Lord Kenyon ruled it to be a loss by capture, precisely in accordance to which case the Supreme Court of Massachusetts had shortly before decided, *Law v. Goddard*, 12 Mass. 112, and both are plainly distinguishable from *Rice v. Homer*. In the *Nisi Prius* case before Lord Kenyon, the vessel was merely blown out of its course, but may have been still uninjured by the perils of the seas.

loss of it in consequence of the injury, the court in Ohio, considering the insurers not to be liable for a total loss, adjudged them to be liable for the damage by the injury;<sup>1</sup> which is certainly a right decision, assuming that they were not liable for the eventual stranding and sinking; but as these were a direct consequence of the striking, the better decision, it seems, would have been, that the underwriters were liable for a total loss by the striking, although the sinking took place three or four hours after the period of the risk had ended.

1137. *If, where different parties, whether the assured and the underwriter or different underwriters, are responsible for different causes of loss, which concur in the loss, and the damage by each cause cannot be distinguished, the party responsible for the predominating efficient cause, or that by which the operation of the other is directly occasioned as being merely incidental to it, is liable to bear the loss.*

The decision of the question thus arising seems not to be governed by any general presumption or rule as to the burden of proof between the assured and underwriters in the same policy, since it arises also between several underwriters who insure against different perils.

The above proposition is not happily expressed by the maxim, *Causa proxima non remota spectatur*, yet it seems to be the only sense in which that maxim is true, since the predominancy and efficiency of one of divers concurring causes constitutes the material consideration.

Thus, in the case before referred to, of insurance being against perils of the seas, American condemnation being at the risk of the assured, the vessel ran aground in attempting to leave the harbor of New York by night, and evade the embargo, and was thereupon next day seized and condemned for a violation of the embargo; Best, C. J., intimated an opinion that it was a total loss by perils of the seas.<sup>2</sup>

So, in case of insurance on goods from London to Maracaybo, "free from capture and seizure," the vessel was stranded off the latter place, and a part of the cargo thereby damaged, and both

<sup>1</sup> *Howell v. Cincinnati Ins. Co.* 7 remarking upon *Livie v. Janson*, 12 Ohio, 276. East, 648.

<sup>2</sup> In *Hahn v. Corbett*, 2 Bingham, 205,



vessel and cargo were seized by the Royalists then in possession of the coast, and considered to be good prize on account of the voyage having been intended to supply the insurgents, who had previously been in possession there. Best, C. J., and Park and Burrough, Justices, of the English Common Pleas, adjudged it to be a total loss of both the damaged and undamaged goods by perils of the seas.<sup>1</sup>

Where the policy is against fire, or perils of the seas, and not against barratry, the policy does not cover a loss by the vessel being barratrously burnt or sunk.<sup>2</sup>

Under an exception of "ordinary" perils of the seas, the ship being taken out of its course and while in possession of captors lost by perils of the seas, the loss was held in Massachusetts, by Parker, C. J., and his associates, to be that of the assured.<sup>3</sup> Kent, C. J., states a different doctrine. He says: "Suppose the policy against capture only, and the vessel was captured and wrecked while in the hands of the captors, I should think the assured might recover for a total loss."<sup>4</sup> But this surely should depend upon the fact of the shipwreck being caused directly by the capture. In all other respects, each party runs his own risk, as held in the Massachusetts case before referred to, such being the plain import of the policy.

A ship being insured in the port of Cadiz against "no risk but sea-risk," was, during a tide higher by sixteen feet than had been known before, driven upon a sand-bank, and, lying much buried in mud and sand, two hundred yards from high-water mark, damaged and not worth getting off, was there burnt by some French soldiers from a neighboring battery. The jury found this to be a total loss by sea-risk, and the verdict was acquiesced in.<sup>5</sup>

But under another policy against the same risk, on the cargo of the vessel, which was burnt with it, not having been materially damaged by the stranding, Kent, C. J., and his associates, held it not to be a total loss by sea-risk.<sup>6</sup>

<sup>1</sup> Hahn v. Corbett, 2 Bingh. 205.

<sup>5</sup> Patrick v. Commercial Ins. Co. 11

<sup>2</sup> Waters v. Merchants' Louisville

Johns. N. Y. 9.

Ins. Co. 11 Pet. 213.

<sup>6</sup> Patrick v. Commercial Ins. Co. 11

<sup>3</sup> Law v. Goddard, 12 Mass. 112.

Johns. N. Y. 14.

<sup>4</sup> Shieffelin v. New York Ins. Co. 9

Johns. N. Y. 21.

Where the vessel having sustained damage by a storm would not be worth the expense of repairs on account of its being old and partially decayed, though sufficiently strong to have performed the voyage had she not been so injured, the English Court of Common Pleas held that the insurers were liable for a total loss.<sup>1</sup> In this case the only question would relate to the seaworthiness of the vessel at the commencement of the risk.

A ship and freight were insured "from St. Thomas in the West Indies, to Rio de la Hache, and at and from thence to New York," and the ship was seized and detained, and the master imprisoned, at Rio de la Hache, on the charge of landing some twenty-five dollars' worth of beans without permit, and, on decree which was appealed from and finally confirmed, was released on payment of the value of the beans. The vessel had been detained over four months by these proceedings, and, from long exposure to the weather in a hot climate in an open roadstead, was found, when released, to have been so much injured in her hull, rigging, and sails, that she could not proceed on the voyage without great repairs, which could not be made at that place, or at any other port to which she could proceed. And the repairs, if practicable, would have cost more than her value. Mr. Justice Story held that the underwriters were liable for a total loss by arrest and detention.<sup>2</sup>

1137 a. The *underwriters* on a vessel *are not liable*, under insurance against perils of the seas, *to indemnify the insured owner for the amount he has been liable to pay to the owners of another vessel, on account of damage to the latter by collision*, through the fault of the master and mariners of either or both of the vessels, or without fault on either side.

It was held by Mr. Justice Story,<sup>3</sup> and his decision was confirmed by the Supreme Court of the United States,<sup>4</sup> that a loss

<sup>1</sup> Phillips v. Nairne, 16 Jur. 194.

<sup>2</sup> Magoun v. New England Mar. Ins. Co. 1 Stor. C. C. 157. The policy excepted arrest for prohibited trade, but it appeared from the proceedings that there had been no trade that justified the seizure of the ship.

<sup>3</sup> Peters v. Warren Ins. Co. 3 Sumn. C. C. 389; and see Hale v. Washington

Ins. Co. 2 Stor. C. C. 176; and Matthews v. Howard Ins. Co. 13 Barb. N. Y. 234; 11 N. Y. 9; in which last case a similar judgment is given by Strong, J., and Selden, J., of the Supreme Court of New York, on a policy against "the perils of the lakes, rivers, and canals, and jettisons and damage to the vessel."

<sup>4</sup> Peters v. Warren Ins. Co. 14 Pet.

by paying one half of the value of another vessel sunk by collision of two vessels without fault, under a foreign jurisdiction, is a direct loss by the collision, for which the underwriters on the vessel are liable. This decision is at variance with the English jurisprudence.<sup>1</sup>

The question has since been thoroughly discussed in the Supreme Court of the United States, and the judgment of that court learnedly and elaborately given by Mr. Justice Curtis, that the underwriters on a vessel are not liable for loss to which the assured has been subjected by payment of damage done to another by collision through the negligence of the master and mariners of the insured vessel, on the ground that, though the underwriters are liable for loss by perils insured against consequent to the negligence of the master and mariners, the predominant efficient cause of the loss to the assured was the negligence, which was not a risk directly insured against.<sup>2</sup>

The judgment in this case is put partly upon the fact that the cause of the loss was a tort committed by the persons in charge of the insured vessel, which is certainly a sufficient defence against the claim for a loss by perils of the sea, since an insurance of a party upon a subject against loss by the elements does not apparently import a promise of indemnity to the assured for all losses he may be responsible for by reason of the torts and misdemeanors which may be committed in the management and use of the insured subject, whether it be a vessel or building or other thing, although the elements may concur in promoting the loss. The judgment is, however, put by the court upon two other grounds, namely, the want of any precedent prior to the very recent cases above cited, for fixing any such liability upon underwriters, though similar torts have been frequent from the earliest jurisprudence in matters of insurance, and upon the ground that the loss to the assureds is not the direct or necessary result of physical causes, but arises from the law which imposes upon the assured a liability in respect to third parties. These

99. See also *Nelson v. Suffolk Ins. Co.* 8 Cush. Mass. 477; *Walker v. Boston Ins. Co.* 14 Gray, Mass. 288.

<sup>1</sup> *Devaux v. Salvador*, 4 Ad. & E.

420. This question recurs under the head of General Average.

<sup>2</sup> *General Mut. Ins. Co. v. Sherwood*, 14 How. 352; *Street v. Augusta Ins. Co.* 12 Rich. So. C. 13.



two grounds are as applicable to cases of mere accident without fault, as to those of tort, and there does not appear to be any better reason to fix upon underwriters a liability for accidental damage to third parties than for torts. Underwriters are understood to insure against loss on the insured subject itself, and not against liability for damage to third parties in respect to which it may be one of the instruments or means. The only case in which underwriters in the common form of policies have been heretofore held liable for injury to or sacrifice of the property of third parties or that of the assured other than the insured subject, is the use or sacrifice of other property, for the purpose of saving the insured subject.

It cannot make any difference whether the liability of the assured to third parties or the lien on the insured subject, arises under the foreign or domestic law. Damage by collision through the fault of the two vessels, is assessed upon them in admiralty equally,<sup>1</sup> or pro rata according to the value of each. But whatever loss the insured vessel is liable for on account of damage to the other, is upon precisely the same footing, to our present purpose, as if only the insured vessel had been in fault.<sup>2</sup>

1138. *The underwriter on the cargo is liable to make indemnity for the excess of freight over that originally stipulated, which the insured shipper has been compelled to pay on a transshipment of the cargo, in consequence of the original ship having been hindered by the perils insured against from carrying the cargo to the port of destination.*<sup>3</sup>

The payment of such excess prevents a total loss of cargo by loss of the voyage, and so comes under the general rule already stated, that insurance against a peril covers the expense necessarily or properly incurred to avoid or diminish it.<sup>4</sup>

<sup>1</sup> The Clarence, 3 W. Rob. Adm. 283; The Seringapatam, id. 38.

<sup>2</sup> See, on this subject, supra, No. 1099; infra, No. 1416 et seq. The Boston insurance companies, since November, 1866, have printed in the margin of their policies the following clause: "It is understood that this company are not in any case to be liable for loss or damage to another vessel or her

cargo by collision with the vessel hereby insured."

<sup>3</sup> Per Kent, C., Searle v. Scovell, 4 Johns. Ch. N. Y. 218.

<sup>4</sup> Supra, s. 10, No. 1115; and see Valin, tom. 1, p. 365, tit. du Fret, art. 11; Emerigon, tom. 1, p. 428, c. 12, s. 16; Pothier, des Chart. Part. n. 68; Code de Commerce, liv. 2, tit. 8, No. 107.



Lord Mansfield ruled against such a claim, without stating any ground, but merely asserting that "the underwriters upon cargo have nothing to do with the freight."<sup>1</sup> And Mr. Justice Story reasserts the same doctrine.<sup>2</sup>

In a New York case, under a policy upon the cargo, a ship having been captured was soon released, but the cargo was detained for further proof. On the release of the ship, the captain offered to carry on the cargo to the port of destination, which was impracticable on account of its detention; but it was held that the offer of the master entitled the owners to entire freight. The cargo was afterwards released, and the owners of it were obliged to pay an additional freight for the transportation of their goods to the port of destination. The insurers of the cargo were held to be liable for this extra freight.<sup>3</sup> Mr. Justice Wilde, speaking of this case, says: "No one, I think, can doubt it was correctly decided."<sup>4</sup>

A ship bound on a voyage from Siam to Hamburg was wrecked at the Isle of France, where the captain procured a Dutch vessel to carry forward the greater part of the cargo to Hamburg. Under a policy upon the ship and cargo, the assured claimed of the insurers a reimbursement of the amount of freight paid to the Dutch vessel. The freight paid to this vessel did not amount to so much as would have been due to the owners of the original ship, according to the charter-party, for the part of the voyage remaining to be performed after the shipwreck. Mr. Justice Wilde, giving the opinion of the court, said: "If, however, the Dutch ship had cost more, the underwriters would not have been liable; because the extra expense would have fallen upon the ship-owner, and not upon the owner of the goods. If the ship-owner had refused to provide a new ship, he could have claimed no freight. We must consider the master as acting for the ship-owner in hiring the Dutch ship, and that the owner of the goods was bound to pay only the customary freight from Siam to Hamburg."<sup>5</sup>

<sup>1</sup> *Baillie v. Moudigliani*, Park, Ins. 90; *Marshall*, Ins. 2d ed. 728.

<sup>2</sup> *Caze v. Baltimore Ins. Co.* 7 Cranch, 358. See also *Fiedler v. New York Ins. Co.* 6 Du. N. Y. 282.

<sup>3</sup> *Mumford v. Commercial Ins. Co.* 5 Johns. N. Y. 262.

<sup>4</sup> *Dodge v. Union Ins. Co.* 17 Mass. 476.

<sup>5</sup> *Dodge v. Union Mar. Ins. Co.* 17 Mass. 471.

1138 a. *Damage to goods merely in consequence of other goods being wet, is damage by perils of the seas, as held by Pollock, C. B., Parke, B., Platt, B., and Martin, B., of the English Court of Exchequer, in case of damage to tobacco in consequence of hides on board of the same vessel being wetted and injured, though the tobacco was still dry.*<sup>1</sup>

1138 b. The underwriters on freight may be liable for loss of freight of a memorandum article, though they may be exempted by the memorandum from the loss of the article itself.

1139. *The underwriters on the cargo are not directly answerable for loss by selling goods to defray the expense of repairs of the ship in a foreign port.*

Where the repairs are a subject of contribution in general average, the underwriters on cargo must contribute their proportion of the necessary sacrifice to raise the funds for the purpose of defraying the expense of the repairs, but they are not directly liable to the shipper for such loss.<sup>2</sup>

1140. *Where goods are deteriorated in value by sea-damage, but still remain in bulk and specie, and are delivered at the port of destination, the whole freight being payable, the loss thus sustained by the shipper on account of payment of full freight is not recoverable against his underwriters.*<sup>3</sup>

1141. *The loss of the cargo by the perils against which the ship is insured, whereby the voyage is no longer worth pursuing, is not a constructive total loss of the ship by a loss of the voyage.*<sup>4</sup>

1142. *Insurance of freight covers the risk of loss of that subject by reason of a loss of either the ship by the perils insured against, whereby it is prevented from transporting the cargo,*<sup>5</sup> *or a loss of*

<sup>1</sup> Montoya v. London Ass. Co. 6 Exch. 451; 4 Eng. L. & Eq. 500.

<sup>2</sup> See Dobson v. Wilson, 3 Campb. 480; and Powell v. Gudgeon, 5 Maule & S. 431, Bayley, J., dissenting; and Sarquy v. Hobson, 2 Barnew. & C. 7; 4 Bingh. 131; 1 Younge & J. Exch. 437; 3 Dowl. & R. 192.

<sup>3</sup> See Benecke & Stevens by Phil., Introduction; Baillie v. Moudigliani, Park, Ins. 8th ed. 117. Emerigon mentions a case of advice to pay, in

cases of only half freight under the French law (Ord. 1681, tit. Fret, a. 15; Code de Commerce, a. 299) on goods refused entry at the port of destination (Insurance, tom. 1, p. 545, c. 12, s. 31); but does not give his own opinion.

<sup>4</sup> Kulenkemp v. Vigne, 1 Term, 304; Alexander v. Baltimore Ins. Co. 4 Cranch, 370.

<sup>5</sup> This is the more ordinary way of losing freight.

*the goods by the perils insured against, whereby the earning of freight by the transportation of them is prevented.*<sup>1</sup>

Abbott, C. J., (afterwards Lord Tenterden,) and his associates, held a different doctrine in case of the vessel's putting back to Kingston, the port of departure in Jamaica, on account of sea-damage, and loss of freight on part of the cargo so injured by being wet with sea-water that it was prudently and justifiably sold there, on account of danger of spontaneous ignition if it had been carried on, and because the expense of delay to wash and dry it would have exceeded the amount of the freight of it. The insurers were held not to be liable for this loss, the ground stated being, that, "If it should be held that the underwriter would be liable, it would open a temptation to a master to sail away, under like circumstances, instead of stopping until the cargo could be reshipped."<sup>2</sup> That is to say, if the court should decide for the assured in this case, when the master's proceeding was confessedly justifiable, it might tempt some other master to sell or leave part of the cargo when it was not justifiable. The decision, supported only by such a reason, certainly weighs very little against what seems to be a plain, and is, at least now, a well-established doctrine.

In case of delay for repairs of sea-damage, if the same can be made in reasonable time to carry on the cargo, the master is authorized to retain it unless full freight is paid, and if he delivers it to the shipper without demanding full freight, it is a loss of freight by his mistake, and not by the perils of the sea.<sup>3</sup>

1143. *Insurance* being only against the extraordinary action and effects of the perils insured against,<sup>4</sup> *does not cover the mere straining and indefinite deterioration of the ship*, but only such damage as may be estimated and repaired.<sup>5</sup>

<sup>1</sup> *Barclay v. Sterling*, 5 Maule & S. 6; *Whitney v. N. Y. Firemen's Ins. Co.* 18 Johns. N. Y. 208; implied in *Bradhurst v. Columbian Ins. Co.* 9 id. 19; *De Wolf v. State Ins. Co.* 6 Du. N. Y. 191.

<sup>2</sup> *Moody v. Jones*, 4 Barnew. & C. 394; 6 Dowl. & R. 749. In *Philpott v. Swann*, 11 C. B. N. s. 270, the vessel was driven off by stress of weather be-

fore the whole cargo was on board. The captain could have refitted and taken the rest. It was held not to be a loss by the perils insured against.

<sup>3</sup> *Clark v. Mass. Fire & Mar. Ins. Co.* 2 Pick. Mass. 104.

<sup>4</sup> See *supra*, s. 4, No. 1086, 1087.

<sup>5</sup> See *supra*, s. 8, and *Peele v. Suffolk Ins. Co.* 7 Pick. Mass. 254.

1144. *The underwriter is precluded from alleging, in defence against a claim for a loss, the forfeiture of the policy by a previous act against which he insured; as in case of insurance against barratry and sea-damage, where the master barratrously deviates, the underwriter is not exonerated from the risk by such deviation, and though no loss follows directly from it, he is still liable for loss by perils of the seas.*<sup>1</sup>

1145. *The two subsequent sections are supplemental to, and illustrative of, the inquiries in the present one.*

Thus the inquiry in the next section, as to what effects of perils come within the period of the policy, closely coincides with the subject of the present one, and divers cases in the section subsequent to that are applicable in this:

As, for instance, in a case subsequently stated, of the exception of loss by the mortality of insured horses as distinguished from loss by the effect of sea-risks.<sup>2</sup>

#### SECTION XV. WHAT LOSSES ARE WITHIN THE PERIOD OF THE RISK.

1146. *Whether the risk in certain ports or localities is within the period of the risk, as described in the policy.*

The voyage out may be divided into successive distinct periods.<sup>3</sup> Under a policy on goods on board of the P. "from New Orleans to Havana, from thence to Barita and back to New Orleans," the question arose in Louisiana whether the risk was for two distinct periods, one from New Orleans until arrival at Havana, the other from sailing thence until arrival at New Orleans, or for one entire period from New Orleans until return to that place. The underwriters contended for the first construction, whereby a loss which had occurred at Havana would not

<sup>1</sup> Vallejo v. Wheeler, Cowp. 143.

<sup>2</sup> Gabay v. Lloyd, 3 Barnw. & C. 793; 5 Dowl. & R. 641. Though there is this coincidence in some instances, and a close analogy in others, still, as the questions arising in each of those sections respectively have one aspect in common, whereby they are distinguished

from those we have just been considering, and others of them are wholly different, the grouping of them in the manner adopted would, as it seemed, facilitate the labors of the student, and be more convenient for reference in practice.

<sup>3</sup> Supra, No. 976.



be within either period of the risk; the assured insisted on the latter, which would cover that loss. Eustis, C. J., giving the opinion of the Supreme Court of that State, said: "We have not met with any case in which, when applied to an intermediate port, the words 'thence' and 'from' have the same exclusive sense as when used in regard to the commencement of the voyage. The word 'thence' is not a term of exclusion or of limitation of risks, but descriptive of the course of the voyage." And the loss was adjudged to have occurred within the local termini of the risk, and so within the period specified by the policy.<sup>1</sup>

A similar question had previously arisen in Pennsylvania, under insurance upon a ship originally "at and from Philadelphia to Cork and back to Philadelphia," and a subsequent memorandum, that, "it being represented by the assured that the A. was ordered from Cork to Limerick, and had arrived there, the insurers engaged to see the ship from thence, instead of Cork, back to Philadelphia." A loss occurred while the vessel lay about two miles below Limerick, within what was considered to be a part of the port of that place. Tilghman, C. J., and his associates, understood the original policy to have covered the risk at Cork, and this appears to have been taken for granted by the parties; and the court considered Limerick to be substituted for Cork by the memorandum, and therefore that the loss took place within the local termini of the risk.<sup>2</sup>

1147. *If an illegal act insured against, whereby the subject is forfeited, is committed during the period of the policy, and the seizure is not made until after the expiration of that period, the underwriters are not liable. If the seizure is made during that period, they are liable, in case of condemnation, though subsequent.*

The forfeiture of a ship insured was incurred during the continuance of the risk, by the barratrous act of the master in smuggling goods, but the ship was not seized for the forfeiture until after the risk had ended. The insurers were held not to be liable, as the loss had not in fact happened during the risk.<sup>3</sup>

The ground stated by Mr. Justice Willes, in giving the opinion

<sup>1</sup> Bradley v. Nashville Ins. Co. 3 La. Ann. 708.

<sup>2</sup> Bell v. Marine Ins. Co. 8 Serg. & R. Penn. 98.

<sup>3</sup> Lockyer v. Offley, 1 Term, 252.

of the court, was, that there must be some limitation of the liability of the underwriter. If he could be held for a month after the act of smuggling, and before the seizure, he might be so for a year, and there would be no way of fixing the limit.<sup>1</sup>

Another reason given for this decision distinguishes this case from an injury by the action of the elements, namely, that in this case it is wholly contingent whether the vessel will ever be seized for the forfeiture, and it more resembles the case of an approaching storm at sea, than that of damage by one that had occurred during the period of the risk.

A similar decision was made in Louisiana, in case of seizure in the port of Havana more than twenty-four hours after the arrival of the vessel, when the period of the policy had ended, for an act of smuggling within the twenty-four hours.<sup>2</sup>

In case of seizure during the period of the policy for an act insured against, whereby the vessel is subject to be forfeited, the underwriters are liable; but whether for a partial or total loss, will depend upon the assured's availing himself, in time, of his right of abandonment, or upon the fact of subsequent condemnation.<sup>3</sup>

1148. *Whether, and how far, the underwriters are liable for the effects resulting, after the expiration of the period of the policy, from the operation of the perils insured against during the policy?*

In one of the cases just above referred to, Mr. Justice Willes stated a preceding decision by the English King's Bench,<sup>4</sup> where a ship insured for a certain time "received her death-wound" from a peril insured against, three days before the end of the time, but, by pumping, was kept afloat till three days after it had ended, in which the verdict, being against the claim for the loss, was confirmed by the court.

Mr. J. Willes compares such a case to one of a policy on a life,

<sup>1</sup> In the same case Mr. Justice Willes made the objectionable remark, that it was more important that the question should be decided, than how it was decided, to which neither of the parties to the policy in question, or any other policy, would give his assent.

<sup>2</sup> *Mariatigui v. La. State Ins. Co.* 8 La. 68, decided on the authority of *Lockyer v. Offley*, 1 Term, 252.

<sup>3</sup> *Dorr v. New England Mar. Ins. Co.* 11 Mass. 1.

<sup>4</sup> *Meretony v. Dunlop*, 1 Term, 260.

where the party insured for a year receives a mortal wound during that time, of which he dies after the end of the year. But the cases are not parallel; to render them so, the insurance on the life should be, not against death merely, as a life policy is, but against wounds, as a ship is against perils of the seas. The comparison is accordingly illusive.

A case more similar came before Lewis, C. J., and Radcliff and Kent, Justices, in New York, on a policy upon horses from Liverpool to New York, "against all risks, including the risk of death from any cause whatever, until safely landed." One of the horses died three or four days after being landed, of injuries received in a gale on the voyage. Kent, then Justice, states the question in such case to be, What was the condition of the article when landed? "One of the horses received a death-wound during the voyage. The damages so received are a proper subject of retribution. How much damage ought to have been assessed at the time he was landed?" and the judgment upon this ground, which seems plainly to be the true one, was for the full value of the animal.<sup>1</sup>

A decision of Lord Mansfield and his associates has long before applied the same rule, in case of a policy upon a ship for six months, which was injured during the time by being driven from the basin at Quebec by a field of ice, upon the rocks, and damaged thereby. In the spring, about three months after the period of the policy had expired, she was found to have been injured, but not irreparably. Difficulties supervened from want of materials, which prevented her being repaired, and she was sold. It was adjudged, that

*The claim for loss must be determined according to the injury sustained within the period of the policy, and the consequent condition of the subject at the conclusion of that period.*<sup>2</sup>

If certain consequences will inevitably result after the expiration of the period of the policy, from the operation of the perils insured against during the period, they are surely proper subjects of indemnity, according to the rule above laid down by Chancellor Kent.

A case has arisen in the Ohio jurisprudence, involving this

<sup>1</sup> Coit v. Smith, 3 Johns. Cas. N. Y. 16.

<sup>2</sup> Furneaux v. Bradley, Marshall, Ins. 584.

question. A Mississippi steamboat struck upon the wreck of another, at about eleven o'clock, A. M., and in consequence was stranded, and afterwards sunk at about four o'clock, A. M., of the next day, and it was held that the insurers in a policy which terminated at midnight after the boat struck, were liable only for the damage by collision with the wreck, and not for the subsequent stranding and sinking, and accordingly, as the damage, in case the boat had not subsequently sunk, was less than fifty per cent., the assured had no right to abandon.<sup>1</sup>

The proper question presented by this case seems to have been one of fact, namely, what was the value of the vessel in the situation in which she was after the accident. If she sunk in attempting to make the nearest place of safety, it seems to have been a decided total loss; but if in attempting to pursue the voyage, then the question should seem to have been whether a place of reasonable safety for repairs could have been reached.

A ship was delayed to repair sea-damage which was covered by the policy, and while so delayed was arrested by a temporary embargo, whereby it was detained until after the risk terminated; the insurers were held not to be liable for the loss accruing by this detention subsequently to the termination of the risk.<sup>2</sup>

A British vessel insured from Bilboa to Rouen, till she had been there moored twenty-four hours in safety, arrived at Rouen, where a hostile embargo had been laid upon British vessels. She was not actually taken possession of under the embargo, until after the twenty-four hours, but had been in the power of the officers of government from the time of her arrival. Lord Kenyon instructed the jury, that the loss happened immediately on the vessel's arriving within the operation of the embargo, and so before the expiration of the risk.<sup>3</sup>

1149. *Where the subject, being at sea, is never heard of as surviving the period of the policy*, whether on a life or other subject, it is a question for the jury to determine, from all the circumstances, after a sufficient time has passed to authorize a

<sup>1</sup> Howell v. Protection Ins. Co. 7 Ohio, 284. Otherwise on a policy that subsisted a day longer. Howell v. Cincinnati Ins. Co. 7 Ohio, 276.

Weskett, Ins., art. End of Voyage, &c. n. 5.

<sup>3</sup> Minett v. Anderson, Park, Ins. 55; Peake, 211. See also Fireman's Ins.

<sup>2</sup> Roche v. Thompson, Millar, Ins. 20; Co. v. Powell, 13 B. Monr. Ky. 311.



presumption of a loss, *whether the loss took place within that period.*<sup>1</sup>

So if goods insured against sea-perils are found, some time after the termination of the risk by its own limitation, or by deviation or other forfeiture, to have been injured by the perils of the seas, it is a question for the jury, whether from all the circumstances, it appears that the damage was prior to the forfeiture or other termination of the insurance.<sup>2</sup>

#### SECTION XVI. RISKS EXCEPTED.

1150. It has already appeared,<sup>3</sup> that *certain risks are impliedly excepted in all policies of insurance.*

Besides those, *the contract most frequently makes express exceptions*, by stipulating that it is to be "free from," or "warranted against," certain specified perils.<sup>4</sup>

1151. *The subject of a marine policy may be exposed to all the marine risks incident to the specified voyage, those excepted as well as those covered, during the whole continuance of the risk*, and two or more perils may be *simultaneously* in actual operation to the damage of the subject. It is the damage, or loss, that is the material object of both the stipulation for indemnity and the exceptions, whether express or implied; the underwriter being liable for the direct effects of the perils insured against, while the assured stipulates to bear the direct effects of those excepted.<sup>5</sup>

1152. Under the *exception of all risks on account of "trade in articles contraband of war,"* if the whole or a part of the goods insured are articles contraband of war, and a loss takes place in consequence, the insurers are not liable for such loss.

1153. The *exception of trade in articles contraband of war relates to the goods insured in the policy, and not to other goods shipped on board of the same vessel.*

<sup>1</sup> Patterson v. Black, Marshall, Ins. 2d ed. 781; Brown v. Neilson, 1 Caines, N. Y. 525; Clifford v. Thomaston Ins. Co. 50 Me. 197.

<sup>2</sup> Hare v. Travis, 7 Barnew. & C. 14.

<sup>3</sup> Supra, c. 8 and 10.

<sup>4</sup> As to what language makes an exception, see Westfall v. Hudson Riv. F. Ins. Co. 2 Du. N. Y. 490; Kingsley v. New England Ins. Co. 8 Cush. Mass. 393.

<sup>5</sup> See supra, 1129. Grant v. Lexington Ins. Co. 5 Ind. 23.

1154. The common form of American policies exempts the underwriters from seizure and condemnation for, or loss in consequence of, illicit or prohibited trade and trade in articles contraband of war. The exception of such perils is to some purposes the converse of the insurance against the same perils, which has been before considered.<sup>1</sup>

“Illicit” trade is not, as we have seen, synonymous with “contraband,” and this latter covers different species of trade, and the exception is made also in divers forms, but the construction of the divers parts and forms of the exception is so similar, that they may be classed together.

The principal question here is, whether the exception extends to seizure and detention under a mere pretence, or a groundless charge of such trade, where the insured subject is within a foreign jurisdiction; upon which question the better doctrine seems to be that adopted by the Supreme Court of the United States, namely,

*The exception of the risk of illicit, prohibited, and contraband trade, exonerates the underwriter from liability, not only where there has actually been such, but also where there is reasonable, legal, and justifiable ground for seizure and detention on account of it.*<sup>2</sup>

THE INSURERS ARE NOT LIABLE for loss under this exception,

Where there is an attempt to trade, though there is no actual trading, as held by the Supreme Court of the United States :<sup>3</sup>

Or a mere sailing on the voyage, as held in Massachusetts :<sup>4</sup>

Or when the vessel arrives at the port of destination, and is there denied entry, as held in New York :<sup>5</sup>

<sup>1</sup> Supra, s. 11. This exception is said to have been introduced in Philadelphia as early as 1778. *Smith v. Delaware Ins. Co.* 3 Serg. & R. Penn. 82.

<sup>2</sup> *Carrington v. Merchants' Ins. Co.* 8 Pet. 495. And see *Bradstreet v. Neptune Ins. Co.* 3 Sumn. C. C. 600; *Magon v. New England Mar. Ins. Co.* 1 Stor. C. C. 157. And see relative to this exception, *Laing v. United Ins. Co.* 2 Johns. Cas. N. Y. 174, in the Supreme Court of New York; and on the same voyage, *Johnston v. Ludlow*, id. 481, in

the Court of Errors of that State; *Smith v. Delaware Ins. Co.* 3 Serg. & R. Penn. 82; *Faudel v. Phoenix Ins. Co.* 4 id. 29.

<sup>3</sup> *Church v. Hubbard*, 2 Cranch, 187; *Andrews v. Essex Mar. Ins. Co.* 3 Mas. C. C. 6; *Decrow v. Waldo Ins. Co.* 43 Me. 460.

<sup>4</sup> *Higginson v. Pomeroy*, 11 Mass. 104. See also *Smith v. Delaware Ins. Co.* 3 Wash. C. C. 127.

<sup>5</sup> *Suydam v. Marine Ins. Co.* 1 Johns. N. Y. 181.

Or where the goods, described as Spanish, are condemned under the charge of their being Spanish, as held by the Supreme Court of Louisiana :<sup>1</sup>

Or where the goods are seized and condemned for trade in fact illicit, though the master or other representative of the assured has no intention to trade illicitly, or knowledge of the law under which the property is condemned, as ruled by Mr. Justice Washington :<sup>2</sup>

Or where the trade is in fact illicit under a foreign law, though the officers of the foreign government to which the place is subject give permission for the trade without authority so to do, as held in New York.<sup>3</sup>

THE INSURERS ARE LIABLE for loss, notwithstanding the exception,

Where the seizure of the cargo in the port of destination was apparently by arbitrary violence, there being no evidence of condemnation for such trade, as held in New York :<sup>4</sup>

And where there is in fact no illicit trade or reasonable ground of seizure, although seizure is unlawfully made under a pretence thereof, as ruled by Mr. Justice Washington ;<sup>5</sup> and by Mr. Justice Story ;<sup>6</sup> and by the Supreme Court of Pennsylvania ;<sup>7</sup> and by the Supreme Court of New York :<sup>8</sup>

And where the illicit trade comes within a peril insured against, as by barratry, as held in New York :<sup>9</sup>

And where the trade at the port of destination is rendered illicit by a peril insured against, as by detention of the vessel by a belligerent, as held in Pennsylvania :<sup>10</sup>

And where the policy is on goods or specie, and the export of specie from the port named is known to the underwriters to be prohibited, as held in New York :<sup>11</sup>

<sup>1</sup> *Goicoechea v. La. State Ins. Co.* 6 Mart. N. S. La. 51.

<sup>2</sup> *Smith v. Delaware Ins. Co.* 2 Wash. C. C. 127.

<sup>3</sup> *Tucker v. Juhel*, 1 Johns. N. Y. 20.

<sup>4</sup> *Gracie v. New York Ins. Co.* 13 Johns. N. Y. 161.

<sup>5</sup> *Graham v. Penn. Ins. Co.* 2 Wash. C. C. 113.

<sup>6</sup> *Magoun v. New England Mar. Ins. Co.* 1 Stor. C. C. 157.

<sup>7</sup> *Smith v. Delaware Ins. Co.* 3 Serg. & R. Penn. 82.

<sup>8</sup> *Francis v. Ocean Ins. Co.* 6 Cow. N. Y. 404.

<sup>9</sup> *American Ins. Co. v. Dunham*, 12 Wend. N. Y. 463; and S. C. on error, 15 id. 9.

<sup>10</sup> *Savage v. Pleasants*, 5 Binn. Penn. 403.

<sup>11</sup> *Seton v. Delaware Ins. Co.* 2 Wash. C. C. 175.

And where the exception is of liability for loss by "existing regulations," and the loss is by one made subsequently, as held in Massachusetts.<sup>1</sup>

1155. *Whether the decree of a foreign tribunal is conclusive of the fact of illicit trading* in reference to the exception of such trade, comes under consideration subsequently.<sup>2</sup>

1156. *The insurers are exonerated under the exception of prohibited trade, though the prohibition is subsequent to the date of the insurance.*<sup>3</sup>

1157. *The exception of illicit trade has reference only to the goods of the assured, not to those of other shippers;*<sup>4</sup> whether a shipment of other goods that are illicit is known to both parties to the policy;<sup>5</sup> or to the assured, and not to the insurers.<sup>6</sup>

1158. *In case of an exception of seizure for illicit trade, it is requisite, in order to bring a case within it, that there should be a "seizure;"* the mere fact of illicit trade without a seizure is not sufficient.<sup>7</sup>

Goods were insured from New York to Cherbourg, "free from seizure for illicit or prohibited trade." The ship and cargo were seized at Cherbourg under the Berlin Decree, and condemned "on the ground of a false declaration by the captain," that he had not gone to England on the voyage. This was held in New York not to be a "seizure for illicit trade," and the underwriters were adjudged to be liable for the loss.<sup>8</sup>

1159. *Whether under the exception of the risk of blockade the underwriters are liable for an illegal capture on account of an actually existing blockade, where there has been no violation of it?*

Under insurance on a vessel and cargo against "all risks, Hispaniola and blockaded ports excepted," Marshall, C. J., and his associates, held the underwriters to be liable for loss by capture,

<sup>1</sup> Wood v. New England Mar. Ins. Co. 14 Mass. 31.

<sup>2</sup> See *infra*, No. 2104 et seq.

<sup>3</sup> Smith v. Delaware Ins. Co. 3 Wash. C. C. 127.

<sup>4</sup> Cucullu v. Orleans Ins. Co. 6 Mart. N. S. La. 13.

<sup>5</sup> Bowne v. Shaw, 1 Caines, N. Y. 489.

<sup>6</sup> De Peyster v. Gardner, 1 Caines, N. Y. 492.

<sup>7</sup> Graham v. Penn. Ins. Co. 2 Wash. C. C. 113; Kohn v. New Orleans Ins. Co. 12 La. 349.

<sup>8</sup> Mumford v. Phœnix Ins. Co. 7 Johns. N. Y. 449.



after the master, having been sailing for Curaçoa, had changed his course to return to Norfolk on notice that Curaçoa was blockaded.<sup>1</sup>

The exception of "risk of blockaded port" has been held in New York, by Kent, C. J., and his associates, to exonerate the insurers from loss "that arises by reason of the blockade," though there is no violation of it, and though the capture for a violation is illegal.<sup>2</sup>

From analogy to the well-established rule in reference to the exception of illicit trade,<sup>3</sup> I infer the better doctrine to be, that,

*Under the exception of the risk of blockade, the insurers are liable in case of there being no violation of a blockade or intention to violate one and proceeding with such intention, unless the phraseology of the exception in the particular case imports a larger exemption.*

This is adopting the presumption, that the parties have reference to an actual blockade and a violation of it, or intent to violate it, such presumption being subject to be rebutted.

1160. *Whether the exception of risks in a port is applicable to its outports and stations?*

Under this exception, the port of Varel is held by Lord Ellenborough and his associates to extend fifteen miles below that place on the river Jahde.<sup>4</sup>

And the port of Pillau was held by the same court to extend to the outer harbor of that place, two miles from the inner harbor.<sup>5</sup>

Sir James Mansfield and his associates held, on the contrary, that a seizure in Pillau Roads, outside of the harbor, where vessels of the size of the one in question usually discharge a part of their cargoes, was not a seizure in port :<sup>6</sup>

And the same judges held a seizure by French officers then in possession of Wilmar, about four miles further out than where vessels of similar size to the one in question usually began to unload, was not a seizure in that port.<sup>7</sup>

<sup>1</sup> Yeaton v. Fry, 5 Cranch, 335.

<sup>2</sup> Radcliff v. United Ins. Co. 7 Johns. N. Y. 38 ; 9 id. 277.

<sup>3</sup> Supra, 1154.

<sup>4</sup> Jarman v. Coape, 13 East, 394 ; 2 Campb. 615.

<sup>5</sup> Dalgleish v. Brooke, 15 East, 295.

See also Oom v. Taylor, 3 Campb. 205 ; also Maydew v. Scott, id. 205.

<sup>6</sup> Brown v. Tierney, 1 Taunt. 517.

<sup>7</sup> Mellish v. Staniforth, 3 Taunt, 499. The court hesitated in this case, because

A similar decision was subsequently made by the same court in respect of an exception of confiscation at the same place;<sup>1</sup> and also in respect of an exception of capture at that port.<sup>2</sup>

In these decisions the two courts are plainly at variance. Sir J. Mansfield said, in the last case referred to, that "no doubt the underwriters intended to protect themselves against the risk of that loss which had occurred," but that he could not get over the words of the policy, which did not distinctly include the case within the exception. This is in conformity to the rule, that a doubt on this exception must operate against the underwriters.

In another case Lord Ellenborough himself instructed the jury less favorably to the underwriters. A vessel was insured at and from Rotterdam to London, with liberty to touch at all ports, "free from capture in port." The ship was captured while at anchor at Ghoree Ghat, about half a mile from Ghoree, in an open roadstead, within the headlands which form the mouth of the river Maese. Lord Ellenborough said, if you would protect yourself by the exception, "you must show that the ship was within some port at the time of the capture. No witness has stated that the place where she lay was within the port of Rotterdam or of Ghoree, or within any other port."<sup>3</sup>

I accordingly conclude, as the better and only general doctrine, that,

*In case of reasonable doubt, under the exception of seizure in port, whether the place of the seizure is in port, the underwriters are liable for the loss.*<sup>4</sup>

1161. *In case of any loss technically total in its character, by*

the captain lay about five hours in a situation as much exposed to seizure as if he had been in the port, after he had learned that the place was in possession of the French; but they felt bound to consider the place as not being in the port.

<sup>1</sup> Levy v. Vaughan, 4 Taunt. 387.

<sup>2</sup> Keyser v. Scott, 4 Taunt. 660.

<sup>3</sup> Baring v. Veaux, 2 Campb. 541.

<sup>4</sup> See Levi v. Allnutt, 15 East, 267.

In order to arrive at a practical general rule in respect of what outports and distances, stations, channels, and

anchoring-grounds, are to be considered to be within a port, and whether a port is to be understood as having the same limits in respect of insurance and all other contracts, and also in respect of jurisdiction and of crimes, it would be necessary to go into a protracted digression on the subject, somewhat in the character of a distinct treatise, which would be overstepping the proposed limits of this work. The inquiry is, therefore, here and in other places where it occurs, dismissed quite short of any such thorough discussion.

*a peril insured against, the insurers are liable though the loss is followed by the operation of an excepted peril, upon the subject.*

Goods being insured with the exception of seizure in port, the vessel was seized in Pillau Roads by Prussian soldiers from Pillau, and Frenchmen from a French privateer. The dispute between the two sets of captors was referred by the Prussian government to that of France, and the French court of prizes gave the prize to the privateer's men. Lord Ellenborough said, "There was no confiscation;" and Mr. Justice Grose, "The Prussian government did not confiscate, but abjured and renounced the property;" and the case was decided not to come within the exception.<sup>1</sup>

This seems to have been deciding the loss to be by the first act of force, rather than by the subsequent acts and proceedings, contrary to a prior judgment by the same court.<sup>2</sup>

In a New York case, under a policy on cargo from Philadelphia to St. Sebastian's, with the exception of all risks in port but sea-risk, the vessel was captured about four leagues from St. Sebastian's, and taken into Passage, and taken thence by a French crew to Bayonne, where the cargo was sequestered. This was held to be a loss by capture for which the insurers were liable.<sup>3</sup>

So under a policy on goods "free from capture and seizure," the ship having been stranded on the Spanish coast, and the cargo seized by the officers of the government as prize, it was held by the English Court of Common Pleas, that the underwriters were liable for a loss by perils of the seas.<sup>4</sup>

A decision contrary to the preceding has been made in Maryland, under an exception of "seizure in port" in a policy on a vessel, which, being captured in 1810 and carried into the Spanish port of Bermia, and thence to Bayonne, was, without any legal proceedings being had, taken in the latter place for the public service. This was held, in Maryland, to be a loss by seizure in port for which the insurers were not liable.<sup>5</sup>

<sup>1</sup> *Levi v. Allnutt*, 15 East, 267.

<sup>4</sup> *Hahn v. Corbett*, 2 Bingh. 205; 9

<sup>2</sup> *Livie v. Janson*, 12 East, 648; *J. B. Moore*, 390.

*supra*, No. 1136.

<sup>5</sup> *Barney v. Maryland Ins. Co.* 5

<sup>3</sup> *Duval v. Commercial Ins. Co.* 10 *Harr. & J. Md.* 139.

*Johns. N. Y.* 278.

So under a policy on goods against fire and an exception of loss by theft, the loss by plunder of the goods after they had been removed to save them from fire, was held in Missouri to come within the exception.<sup>1</sup>

In the cases last stated, the subject was considered at the time not to have been totally lost until the excepted risk intervened, and the underwriters ought, therefore, to have been held liable, at least, for the prior damage and expense by reason of a peril insured against.

1162. The cases afford a great variety of particular exceptions of risks.

A cargo being insured to Havana, "*free from loss if not permitted to entry in consequence of having negroes on board,*" the vessel, according to a standing regulation, was required to come to anchor near the Moro Castle, until it was visited, and was not permitted to go into the inner harbor and be moored at the docks until the negroes had been landed, and was wrecked before landing them or being visited. It was held by the Supreme Court of New York, that the entry intended by the exception is that at the custom-house, and that the insurers were liable.<sup>2</sup>

*The exception of loss by the "ordinary perils of the seas," means perils of the seas as distinguished from arrest, capture, &c., and not as distinguished from extraordinary perils, and the insurers are liable under such exception for loss by shipwreck.*<sup>3</sup>

*A warranty "against loss to or from the sheathing," is merely an exception of the risk of damage to the sheathing, not a condition that the sheathing shall be maintained entire during the risk; and the insurers continue to be liable for loss notwithstanding that the sheathing may have been injured by perils of the seas.*<sup>4</sup>

*The exception of loss on a ship "by the British, in case of capture, the sea-risks to continue," was held by the Supreme Court of New York to exonerate the insurers from "loss attributable to an act of the captors, which, if done by the assured, would absolve the insurers," and they were held not to be liable for damage by*

<sup>1</sup> Webb v. Protection Ins. Co. 14 Mo. 3.

<sup>3</sup> Law v. Goddard, 12 Mass. 112.

<sup>2</sup> Dickey v. United Ins. Co. 11 Johns. N. Y. 358.

<sup>4</sup> Martin v. Fishing Ins. Co. 20 Pick.



collision in consequence of her being moored in a position exposing her to collision with other vessels, so that when the captain regained possession she was a mere wreck.<sup>1</sup>

*The exception of "detention" exonerates the insurers in case of hindrance by a blockade from leaving a port.*<sup>2</sup>

*The exception of "mortality" of insured animals was held by Lord Tenterden and his associates not to apply to "violent death," and the insurers were held liable for loss of mules and other animals from injuries occasioned by the rolling of the ship.*<sup>3</sup> So also for the death of horses, which in tempestuous weather broke their slings and the partitions between them, and died of bruises occasioned by the rolling of the vessel and by kicking each other.<sup>4</sup>

Exception is sometimes made of all risks within a certain region for a time; as in the West Indies, from July 11th to October 15th.<sup>5</sup>

*A provision that the insurers "take no risk in port," extends to all ports at which the vessel touches of necessity, as well as those in the regular course of the voyage.*<sup>6</sup>

*The exception of "French risks" exempts the insurers from "loss by the acts of Frenchmen."*<sup>7</sup>

A provision by law, that the assured on a steamboat shall not recover for a loss by accidents in racing, running into another boat, &c., "except such as is impossible to be foreseen, and avoided," is held in Louisiana to have reference to an impossibility by reasonable intendment.<sup>8</sup>

<sup>1</sup> Coolidge v. N. Y. Firemen's Ins. Co. 14 Johns. N. Y. 308. According to the doctrine that loss by sea-perils in consequence of the mistakes or negligence of the master and mariners is at the risk of the insurers, (see supra, No. 1049,) and to the test applied by Mr. Justice Spencer in the passage above quoted, in which he refers, no doubt, to the acts of the master, the insurers would have been held liable in this case. At the date of this case, however, the assured was understood to be answerable for the mistakes and negligences of the master and mariners, to a much greater degree than at present.

<sup>2</sup> Wilson v. United Ins. Co. 14 Johns. N. Y. 227.

<sup>3</sup> Lawrence v. Aberdeen, 5 Barnew. & Ald. 107.

<sup>4</sup> Gabay v. Lloyd, 3 Barnew. & C. 793; 5 Dowl. & R. 641.

<sup>5</sup> Palmer v. Warren Ins. Co. 1 Stor. C. C. 360.

<sup>6</sup> Patrick v. Commercial Ins. Co. 11 Johns. N. Y. 9. See also Baring v. Veaux, 2 Campb. 541.

<sup>7</sup> Roget v. Thurston, 2 Johns. Cas. N. Y. 248.

<sup>8</sup> Caldwell v. St. Louis Perpetual Ins. Co. 1 La. Ann. 85.

The exception of loss on a steamer from the *bursting of boilers and breaking of engines*, unless it is caused by external violence, is held in Missouri to have reference to violence external, not to the boiler or engine merely, but to the steamer.<sup>1</sup>

The *exception of death by suicide* in life policies is construed to extend only to an act of self-destruction by a person having mental capacity sufficient to render himself responsible for his acts.<sup>2</sup>

*An exception of "seizure" is not limited to an arrest on account of a municipal regulation.*

It was so held in New York, in case of a ship insured with the exception of seizure and taken by French privateers as prize, and not on account of any municipal regulation.<sup>3</sup>

Under the exception of "seizure and any attempt thereof," the underwriters were held liable where the vessel was fired into and sunk through mistake of her nationality.<sup>4</sup>

An exception of "leakage unless by stranding or collision" is held to include all other leakage, though caused by a peril insured against.<sup>5</sup>

Under an exception of the expense of dockage and any loss where the repairs did not exceed ten per cent., it was held in Ohio that the dockage might be included to make up the ten per cent.<sup>6</sup>

1162 a. The *exception of loss "by a usurped power" in a fire policy*, does not exonerate the insurers from loss occasioned by a mob.<sup>7</sup>

An exception of loss by fire occasioned by mobs and riot is

<sup>1</sup> Citizens' Ins. Co. of Missouri v. Glasgow, 9 Mo. 406. Fire caused by the bursting of boilers is held to come within this exception. Montgomery v. Firemen's Ins. Co. 16 B. Monr. Ky. 427; St. Johns v. American Ins. Co. 11 N. Y. 516; McAllister v. Tennessee Ins. Co. 17 Mo. 306. See also Western Ins. Co. v. Cropper, 32 Penn. St. 351. The exception, "not liable for bursting of boilers," includes the consequences, as the sinking of the boat. Strong v. Sun Ins. Co. 31 N. Y. 103.

<sup>2</sup> Supra, No. 895, and cases cited.

<sup>3</sup> Black v. Marine Ins. Co. 11 Johns. N. Y. 287.

<sup>4</sup> Powell v. Hyde, 5 Ell. & B. 607; 34 Eng. L. & Eq. 44.

<sup>5</sup> Neilson v. Commercial Ins. Co. 3 Du. N. Y. 455.

<sup>6</sup> Snapp v. Merchants' Ins. Co. 8 Ohio St. 458.

<sup>7</sup> Drinkwater v. London Ass. Co. 2 Wils. 363. See as to the exceptions in fire policies generally, supra, No. 63.

held not to include a loss where the property is burnt by the military authorities to prevent its use by a usurped power.<sup>1</sup>

The exception of *loss by "civil commotion"* was ruled by Lord Mansfield to exempt underwriters from a loss by a building being destroyed by a mob in a riot against Catholics.<sup>2</sup> But a doubt of this construction is certainly excusable, and the more so, as it was adopted by Lord Mansfield partly on the ground of the successive alterations of the common form of policy used by the London Assurance Company, which in the particular case could only go to show the construction intended by the underwriters, without showing what construction assureds would be authorized to put. And again, if the history of the modifications of the form of the policy of that company should be of weight in determining its construction, it would not be in reference to those of others. The phrase "civil commotion" seems plainly to mean, ordinarily, something more than the mere riotous outbreaks of fanaticism.

An exception is sometimes made of all risks for a time, as, in a fire policy, while a hazardous trade is carried on in the insured premises :<sup>3</sup>

1163. *Whether, in case of doubt and no preponderance of evidence, the presumption is that the loss was by a peril insured against, or one excepted?*

This is a question not free of difficulty. Mr. Justice Story thinks the presumption is that the loss was by the perils insured against.<sup>4</sup>

In insurance on a theatre against fire not originating in the building, it was held in Massachusetts that the burden was on the assured to prove that the fire did not so originate.<sup>5</sup>

Where the doubt arises on the construction of the language, the presumption must be in favor of the assured, since the language is that of the underwriter.<sup>6</sup> Besides this, the case does not seem to admit of any presumption.

<sup>1</sup> Harris v. York Ins. Co. 50 Penn. St. C. C. 360. See also Keyser v. Scott, 4 341. Taunt. 660.

<sup>2</sup> Langdale v. Mason, 2 Marshall, Ins. <sup>5</sup> Sohler v. Norwich F. Ins. Co. 11 2d ed. 791. All. Mass. 336.

<sup>3</sup> Lounsbury v. Protection Ins. Co. <sup>6</sup> Grant v. Lexington Ins. Co. 5 Ind. 8 Conn. 459. 23.

<sup>4</sup> Palmer v. Warren Ins. Co. 1 Stor.

Under a policy upon mules, asses, and oxen, "free from mortality and jettison," it was said that "the word *mortality*, in its ordinary sense, never means violent death," and accordingly the insurers were held liable for the loss of such of the animals as died in consequence of injuries received by the rolling of the ship during a storm. Chief Justice Abbott said: "Suppose a horse were, by the motion of the vessel in a storm, to have his legs broken, but arrive alive; the underwriters would be answerable for that loss."<sup>1</sup>

1164. There are *divers risks not assumed by the underwriter besides those which are made the subjects of direct exceptions*, as we have seen under the heads of implied and express warranties, conditions and stipulations.

#### SECTION XVII. RISKS IN BOTTOMRY INTEREST.

1165. *The risks and losses to which the lender on bottomry on ship and freight, or at respondentia on cargo, is liable, depend upon the particular stipulations of the bond.*

1166. Different forms of bottomry and respondentia bonds have been in use. Formerly the condition seems to have sometimes been, that the bond should become absolute for the whole loan and interest, in case of the ship or goods subsisting in specie at the termination of the risk.<sup>2</sup> But according to the form no less ancient and now generally in use, certain risks to be assumed by the lender, are definitely specified in the bond, or by reference to some form of policy of insurance.<sup>3</sup> The risk may be for a voyage or a certain period of time.<sup>4</sup> It is essential to the

<sup>1</sup> Lawrence v. Aberdeen, 5 Barnew. & Ald. 107.

<sup>2</sup> 1 Magens, 393, cas. 34; 3 Burr. 1394; 1 W. Blackst. 396; 1 Beawes, 332, tit. Bottomry, &c.; 2 Magens, 56, No. 133; Park, Ins. 337; Marshall, Ins. 82; Thompson v. Royal Exch. Ass. Co. 1 Maule & S. 30; Joyce v. Williamson, 3 Dougl. 164; Walpole v. Ewer, Marshall, Ins. 2d ed. 672; and per Kent, J., 2 Johns. Cas. N. Y. 252.

<sup>3</sup> By the ordinance of Hamburg the

lender was not liable for contribution in general average. Title 9, art. 10; 2 Magens, 225, No. 931. By the French law he is liable for general and particular average and entitled to salvage. Le Guidon, c. 19, art. 5; Code de Commerce, art. 141; and see Boulay Paty, Droit Com. tom. 3, p. 168; Weskett, art. Bottomry, n. 23, 27; 2 Magens, 52, No. 132; Gibson v. Philadelphia Ins. Co. 1 Binn. Penn. 405.

<sup>4</sup> The Draco, 2 Sumn. C. C. 157.



validity of the stipulation for maritime interest, that the lender should assume some risks.

In maritime loans as in insurance, fraud by a party will deprive him of the benefit of the contract.

1167. *The risks understood to be assumed by the lender*, under the forms of bottomry and respondeñtia bonds in common use, are perils of the seas including captures and piracy.<sup>1</sup>

1168. *The lender*, who is in effect the insurer on the ship and freight, or on the cargo, *does not take the risk of loss by the misconduct of the borrower*,<sup>2</sup> or his agents.<sup>3</sup> The risk of barratry is not taken by him, unless it is so expressed, any more than in a policy of insurance.<sup>4</sup> The French ordinances exonerate the lender from loss arising from the qualities or defects of the subjects hypothecated;<sup>5</sup> and ordinary wear and tear, breakage and leakage.<sup>6</sup> And contraband.<sup>7</sup> But nothing prevents parties from expressly stipulating that he shall assume these or such other risks which can lawfully be insured against.<sup>8</sup>

1169. The bond should not only specify the perils assumed by the lender, but also the extent of his liability in adjusting losses by such perils, by reference to a policy of insurance or otherwise.

1170. *The property saved in case of wreck or other disaster, continues to be subject to the hypothecation*;<sup>9</sup> but if the loss is by the perils assumed by the lender, the borrower becomes dis-

<sup>1</sup> The lender in hypothecation at Athens took the risk of capture and jettison. Boeckh. Public Economy of Athens, by Lewis. London, 1842, c. 23, p. 139.

<sup>2</sup> Roccus, de Nav. n. 51; Dig. de Naut. Fœn.; Pope v. Nickerson, 3 Stor. C. C. 465; Boulay Paty, Droit Com. tom. 3, p. 4 et seq. and 173, ed. 1822; Emerigon, tom. 2, p. 510; Code de Commerce, a. 326.

<sup>3</sup> Marshall, Ins. 756, book 2, c. 5; Dig. lib. 22, tom. 2, De Naut. Fœn. l. 3; Wilmer v. The Smilax, 1 Pet. Adm. 295, n.

<sup>4</sup> Boulay Paty, tom. 3, p. 161, 175.

<sup>5</sup> Ordinance Louis XIV. tit. Cont. à Grosse Avent. a. 12; Code de Com-

merce, l. 2, tit. 4, a. 137. See also Le Guidon, c. 5, a. 8; Boulay Paty, Droit Com. tom. 3, p. 171, ed. 1822; Emerigon, tom. 2, p. 509; Pothier, Ins. n. 34; Valin, Com. Contrat à la Grosse, a. 12.

<sup>6</sup> Boulay Paty, Droit, Com. tom. 3 p. 172.

<sup>7</sup> Boulay Paty, Droit Com. tom. 3, p. 175.

<sup>8</sup> 2 Emerigon, 510; Des Cont. à la Grosse, c. 7, s. 2.

<sup>9</sup> 1 Magens, 24, s. 24; Appleton v. Crowninshield, 3 Mass. 443; Wilmer v. The Smilax, Pet. Adm. 295, n.; 2 Valin, 12, tit. Des Cont. à Grosse, a. 18; Code de Commerce, l. 2, tit. 9, n. 142.

charged from all liability on his bond excepting to the amount saved.<sup>1</sup> Nothing short of a total loss will discharge the borrower.<sup>2</sup>

1171. *The master cannot impose an absolute liability upon his owners or shippers by hypothecation, he can only give a lien upon the hypothecated subject, and its proceeds, and the owner is bound by his acts only so far as the subject or salvage comes into his hands.*<sup>3</sup>

1172. *It is of importance that the parties in hypothecation should stipulate expressly what risks the lender is to assume.*

Where an hypothecation is made by the owner at the home port, the more usual practice is to refer to some particular form of policy of the same port in specifying the risks to be assumed by the lender, which greatly facilitates the adjustment of claims under the bond, the rights and liabilities of the parties to a policy being more satisfactorily settled than under a bond of hypothecation in which the risks specified or the stipulations as to loss are different from those in a policy of insurance. Hypothecations are, however, most frequently made by the master in foreign ports for the purpose of raising funds for repairing and refitting, under circumstances in which he cannot prescribe the terms of the loan. As the bond only gives a lien on the hypothecated subject and binds him personally as far as the stipulations go, and not his owners, excepting to the extent of the lien,<sup>4</sup> he is, so far as personal liability is concerned, a principal, and this will distinguish the case in respect to loss by his own negligence from that of an insurance by the owner.

1173. *An insurance in favor of a lender in hypothecation may be made against all risks whatsoever, which can be legally insured against, and is not necessarily limited to the risks assumed by him.*

- This follows from the doctrine that a mortgagee has an insurable interest in the mortgaged subject to its full value, for a bottomry is in effect a mortgage of the ship or goods in respect to all the risks except those assumed by the lender. Suppose the lender

<sup>1</sup> Magens, 62, c. 5.

<sup>4</sup> Rucker v. Conyngham, 1 Pet. Adm.

<sup>2</sup> Marshall, Ins. b. 2, c. 5.

295.

<sup>3</sup> See supra, No. 302, 303; and infra, No. 1537, 1561, 1566, 1569, 1583.

to assume only the risk of capture, he has the same interest in respect to ordinary perils of the seas as a mortgagee would have, for if the vessel is not captured he has a lien upon it to the amount of his loan, and marine interest, of which he cannot avail himself if it is lost by shipwreck.<sup>1</sup>

1174. A bottomry loan being on condition that *the bond should be void if the ship "should be taken by the enemy,"* the ship was taken, and afterwards retaken, and repaired, and subsequently completed the voyage; but its value, on arrival at New York, was not sufficient to answer the bond. Lord Mansfield: "We are all of opinion, that the 'taking of the enemy' contemplated, does not mean a mere temporary taking. It must be such a taking as constitutes the loss of the ship, and which would amount, between the insurer and insured, to a total loss." It was accordingly held not to be within the risks assumed by the lender.<sup>2</sup>

1175. It has been the practice in the United states, to specify the risks of the lender more particularly than they were specified in the old form of the bottomry and respondentia bonds, and *it is usual for the lender to assume the risk of average and to be entitled to the benefit of salvage.*

Under a respondentia bond with the condition that if "an utter loss of the ship should happen, and the borrower should within three months after account for and pay over a proportional average on the goods not lost, the bond should be void," the ship was so damaged as to be unnavigable, and the goods being transshipped arrived and came to the hands of the borrower. The bond was held thereby to become absolute.<sup>3</sup>

<sup>1</sup> The above proposition seems to be negatived by a judgment of Lord Ellenborough and his associates, *Thompson v. Royal Exch. Ass. Co.* 1 Maule & S. 30; in which it is held that the lender is not entitled to recover under a policy upon a bottomry interest, so long as the ship exists in specie, though so damaged by the perils assumed by the lender that it is wholly worthless as a ship. The liability of the insurers was, however, presented by counsel and considered by the court as being merely the alternative to that of the borrower, it being assumed that if the borrower was liable for the loan, the underwriters were not liable for the loss, but the reason for this assumption is not given. The case seems to have been properly a question of salvage.

<sup>2</sup> *Joyce v. Williamson*, 3 Dougl. 164.

<sup>3</sup> *Ins. Co. of Penn. v. Duval*, 8 Serg. & R. Penn. 138.









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